Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. ~~75-~~ 1723

RAYMOND MUZQUIZ, MARIANO GRANADOS, ROBERT G. BROOKS, WILLIAM C. MADISON, CHARLES R. HARRELSON, KENNETH W. ESKEW, EDDIE D. HAMM, and every other person similarly situated in the same or similar class,

Petitioners,

versus

CITY OF SAN ANTONIO; BOARD OF TRUSTEE, FIREMEN AND POLICEMEN'S PENSION FUND OF SAN ANTONIO and the members of said Board, individually and in their capacity as members of said Board, named herein as JOHN GATTI, WALTER W. MCALLISTER, DR. HERBERT CALDERON, JOE DISTEFANO, HENRY ANTAN, L. E. MASON and A. G. CAMPA, and JOHN DOES 1 through 100,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

RAYMOND MUZQUIZ, et al,)
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Petitioners,)
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vs.)
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CITY OF SAN ANTONIO, et al.)
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Respondent.)

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Raymond Muzquiz, Mariano Granados, Robert G. Brooks, William C. Madison, Charles R. Harrelson, Kenneth W. Eskew, Eddie D. Hamm, and every other person similarly situated in the same or similar class, through their counsel pray that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit in the case of Muzquiz, et al., v. City of San Antonio, et al, 528 F2d 499 (1976).

OPINIONS BELOW

The United States District Court for the Western District of Texas at San Antonio granted a summary judgment with an opinion on July 1, 1974. The opinion is attached as Appendix A, the order as Appendix B. The Court of Appeals filed a panel opinion October 8, 1975, reported at 520 F2d 999. It is attached as Appendix C. On rehearing en banc an opinion was filed February 27, 1976, reported at 528 F2d 499. It is attached as Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1976. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is involked under Title 28 U.S.C.A. Sec. 1254(1).

QUESTIONS PRESENTED

1. Are the individual members of a Police and Firemen's Pension Fund Board "persons" under Title 42 U.S.C.A. Sec. 1983 in an action for equitable relief which includes, among other things, a demand for restitution of monies from the fund which had been allegedly expropiated from petitioners pursuant to an unconstitutional state statute?

2. Does federal jurisdiction lie for equitable relief against the Pension Fund Board and its individual members directly under the prohibitive provisions of the Fifth and Fourteenth Amendments as being self-executing and, therefore, needing no implementing statute?

3. Does federal jurisdiction lie for equitable relief against the Pension Fund Board and its individual members pursuant to Title 28 U.S.C.A. Sec. 1331 as a federal question without regard to jurisdictional amount as the $10,000.00 requirement is contrary to Article III, Sec. 2 of the Constitution and contrary to the Seventh Amendment to the Constitution, particularly in light of the history of the enactment of Article III, Sec. 2?

4. Does federal jurisdiction lie for equitable relief against the Pension Fund Board and its individual members pursuant to Title 28 U.S.C.A. Sec. 1343 without regard to Title 42 U.S.C.A. Sec. 1983?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Constitutional provisions are set forth in Appendix A:

United States Constitution, Article III

United States Constitution, Amendments V, VII, XIV

The following Federal Statutes are set forth in Appendix A:

Title 28 U.S.C.A. Sec. 1331

Title 28 U.S.C.A. Sec. 1343

Title 42 U.S.C.A. Sec. 1983

Title 42 U.S.C.A. Sec. 1983

The following State of Texas Statute is set forth in Appendix A:

Vernon's Texas Civil Statutes, Article 6243f, Sec. 19.

STATEMENT OF THE CASE

Petitioners are former San Antonio policemen and firemen who have brought a class action to challenge a no-refund provision in the statutes governing the City's Firemen's and Policemen's Pension Fund. Vernon's Texas Civil Statutes, Article 6243f, Sec. 19 (Appendix A). The suit was originally filed as a class action purporting to represent a class of all former policemen and firemen of Houston, Dallas, El Paso and San Antonio, requesting a three-judge panel; the District Court found jurisdiction and the action was severed into four separate class actions. Walker v. City of Houston, 341 F.Supp. 1124

(S.D. Tex. 1971). Each action was held to be properly considered by a single district judge. 341 F.Supp. 1117 (S.D. Tex. 1971).

The petitioners asked for several forms of equitable relief[1] and alleged four bases for jurisdiction: (1) Title 28 U.S.C.A. Sec. 1343 for an action under Title 42 U.S.C.A. Sec. 1983; (2) Directly under the Fifth and Fourteenth Amendments as being prohibitive and therefore self-executing; (3) Title 28 U.S.C.A. Sec. 1331 without regard to jurisdictional amount as the requirement is unconstitutional contrary to Article III, Sec. 2 of the Constitution and the Seventh Amendment to the Constitution; and (4) Title 28 U.S.C.A. Sec. 1343 without regard to Title 42 U.S.C.A. Sec. 1983.

The Trial Court assumed jurisdiction and granted a summary judgment on the merits finding the statute constitutional (Appendices B and C).

In the Court of Appeals the panel affirmed the District Court on the merits. 520 F2d 993, Appendix D. The Court of Appeals then sua sponte ordered a rehearing en banc, vacated the decision of the panel, and affirmed the District Court by finding lack of subject matter jurisdiction. 528 F2d 499 Appendix E.

The Court of Appeals discussed only the meaning of "person" as establishing subject matter jurisdiction under Title 42 U.S.C.A. Sec. 1983, ignoring the other claims of jurisdiction. All four bases for jurisdiction were

[1]Judge Godbold states: "The plaintiffs sought restitution, assorted equitable relief, and damages of almost every kind and variety within the ingenuity of a legal draftsman." 528 F2d at 504-505, Appendix F, p. 146.

presented in the District Court which found jurisdiction to be present. Neither party raised the subject of jurisdiction on appeal, but the panel discussed the meaning of "person" on its own without briefs on the subject. When the whole Court sua sponte ordered a rehearing, petitioners fully briefed their grounds for jurisdiction. When the en banc Court refused to consider the alternative grounds for jurisdiction, those in addition to Title 42 U.S.C.A. Sec. 1983, petitioners filed a Motion to Certify the other questions (Appendix G). All four issues are properly before the Court.

REASONS FOR GRANTING THE WRIT

This is an essential case to explore the bases of federal civil rights jurisdiction, especially important to those who lack money. The Court of Appeals took this case en banc because ". . . it posed questions of jurisdictional importance . . ." Appendix F, p. 133,528 F2d 499, 500. Petitioners have shown four solid bases for jurisdiction, but the Court of Appeals has not given proper consideration to one. The decision of the Court of Appeals, holding that the type of equitable relief prayed for determines whether individual state officers are "persons" under Title 42 U.S.C.A. Sec. 1983, is not only erroneous but it begets mass confusion, such that West Publishing could not write an intelligible headnote. 528 F2d 499. There are thousands of individual class action plaintiffs in several Texas and Louisiana cities whose rights depend on the final resolution of this case.

The complaint here states an action against the San Antonio Police and Firemen Pension Fund Board, an entity, and the

individual Board members for equitable relief in redress for the expropriation of monies from policemen and firemen under an unconstitutional Texas statute.[2] Vernon's Texas Civil Statutes, Art. 6243f, Sec. 19 (Appendix A). Petitioners' claim four bases for jurisdiction, all equally capable of furnishing relief in equity; they are as follows:

1. Against the individual members of the Board pursuant to Title 28 U.S.C.A. Sec. 1343 alleging a cause under Title 42 U.S.C.A. Sec. 1983 for equitable relief.

2. Against the Board and its members pursuant directly to the Fifth and Fourteenth Amendments to the Constitution on the ground that said amendments, being prohibitory provisions, are self-executing and, therefore, need no particular implementing statute to confer federal jurisdiction.

3. Against the Board and its members pursuant to Title 28 U.S.C.A. Sec. 1331 as a federal question without regard to jurisdictional amount as the $10,000.00 statutory requirement is contrary to the Seventh Amendment and to Article III, Sec. 2 of the Constitution in light of the history of the enactment of Article III, Sec. 2.

4. Against the Board and its members pursuant to Title 28 U.S.C.A. Sec. 1343 without regard to Title 42 U.S.C.A. Sec. 1983.

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[2]A claim for damages was also plead originally, but was withdrawn during argument in the Court of Appeals.

These are all equally deserving of consideration and were properly presented, as Petitioners have shown in the Statement of The Case, supra. The Court of Appeals only discussed defining "person" under Title 42 U.S.C.A. Sec. 1983. This Court must eliminate the confusion created by the erroneous opinion of the en banc Fifth Circuit Court of Appeals, in addition to considering the other bases for jurisdiction.

I. THE HOLDING BELOW, THAT THE INDIVIDUAL MEMBERS OF THE PENSION FUND BOARD ARE NOT "PERSONS" UNDER TITLE 42 U.S.C.A. SEC. 1983 FOR EQUITABLE RELIEF WHICH WOULD EFFECT THE FUND, IS CLEARLY ERRONEOUS AND CREATES CONFUSION WHICH WILL PREVENT MEANINGFUL LITIGATION UNDER THE ACT.

As stated by Justice Tuttle in his dissent ". . . the Court seems to me to have whittled down the clear statutory grant of civil rights litigation under color of state law to little more than an empty promise." Appendix F, p. 138; 528 F2d at 501. The decision is directly in conflict with Kenosha v. Bruno, 412 U.S. 507 (1973), where the Court clearly held that the meaning of the word "person" does not change with the nature of relief sought. The Fifth Circuit is now not only in conflict with the Supreme Court and other Circuits, but apparently with itself. See United Farm Workers of Fla. Housing Project, Inc., v. City of Delray Beach, 493 F2d 799 (5th Cir., 1974); Davis v. Bd. of School Commissioners of Mobile County, 526 F2d 865 (5th Cir., 1976).

The confusion wrought is shown by the nature of the opinions in the 9 - 7 en

banc decision. The panel originally found jurisdiction with Justice Godbold dissenting. When the Court en banc reversed the panel on rehearing, Justice Dyer wrote the opinion for the Court and adopted in large part Judge Godbold's prior dissent. On reflection, Justice Godbold dissented from Justice Dyer stating:

> "I am unable to fully join in Judge Dyer's opinion despite the fact that it adopts in large part the dissenting opinion that I filed to the panel opinion. I disagree with the holding with respect to declaratory and injunctive relief against the individual Trustees. I now see that issue more clearly and hopefully can discuss it more clearly, than in my earlier dissent."
> Appendix F, p.143, 528 F2d at 504.

The confusion of taking a "remedy asked" approach to jurisdiction is readily evident from reading Chief Judge Brown's and Judge Thornberry's concurring and dissenting opinions. As Judge Thornberry pointed out, the test for jurisdiction adopted by the Court will be next to impossible to administer. It is obvious that the Fifth Circuit Court of Appeal's decision will cloud the law to the detriment of the whole nation![3]

The consideration of appropriate, equitable relief in the context of defining "person" under Sec. 1983 entirely

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[3]Counsel for petitioners have already received inquires from other parts of the country regarding the meaning and impact of this decision.

misapprehends the nature of equitable relief, which is a flexible power given to the Courts to fashion a remedy to do justice to the situation, here to redress a constitutional deprivation. If the claim is only a concealed attempt at damages from the non-person entity, or an unjustified raid on public funds, the granting would not be equity. This is where the decision should lie, on the appropriateness of the relief on the merits, not on whether there is jurisdiction.

This is easily demonstrated in this case. Petitioners sought several forms of equitable remedy, including declaratory and injunctive relief, only one of which, restitution, was even considered by the Court of Appeals majority because it would have required payment of some sort from the Fund. This, of course, assumes that it is the Fund's money. But, this Court long ago decided that in cases of taking property without just compensation title does not pass until the compensation is received. Cherokee Nation v. Southern Kansas Railroad Co., 135 U.S. 641 (1890). This is a far cry from asking damages from the Fund.

The Court can readily see jurisdiction is not the place to decide on the appropriate remedy. It must be briefed and argued on the merits. That the Court of Appeals majority has confused jurisdiction with the consideration of appropriate relief is ably pointed out by the dissenting opinions of Judges Tuttle and Godbold and the concurring and dissenting opinion of Judge Thornberry. With this decision federal jurisdiction will be hopelessly confused.

Merely the citation of Kenosha v. Bruno, supra, is sufficient to show the erroneousness of this decision. Since Kenosha, the Supreme Court has approved injunctions issued against public officers under Sec. 1983. Goss v. Lopez, 419 U.S. 499 (school officials); Wolff v. McDonnell, 418 U.S. 539 (1974) (pension officials). In Bradley v. School Board, 416 U.S. 696 (1974), the Court permitted a suit under Sec. 1983 to require the payment of an attorney's fee to be charged against the Board itself. It is hard to imagine any injunctive relief against a public officer without it having an effect on the finances of the entity he represents. If the lower Court's holding stands, civil rights redress in equity will be almost eliminated. Jurisdiction is obviously present for equitable relief against the individual board members under Sec. 1983.

II. THERE IS JURISDICTION PURSUANT TO THE RELEVANT PROVISIONS OF THE FIFTH AND FOURTEENTH AMENDMENTS WHICH ARE PROHIBITORY IN NATURE, AND AS SUCH ARE SELF-EXECUTING; NEEDING NO IMPLEMENTING STATUTES.

We are concerned here with a claim that a State has expropriated property from petitioners in violation of the Fifth and Fourteenth Amendments. Our duly presented claim of jurisdiction directly under the self-executing Fifth and Fourteenth Amendments should not have been ignored by the Court of Appeals as this is a valid basis for jurisdiction. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). That this ground was not recognized by a Court of Appeals certainly has nationwide importance to civil rights litigation.

"It is a settled rule of constitutional construction that prohibitive and restrictive provisions are self-executing and may be enforced by the Courts independently of any legislative action . . ." 16 C.J.S., Const. Law, Sec. 49, page 147.

"It is generally held that a constitutional prohibition against taking or damaging private property for public use without just compensation therefor is self-executing, even though the method of ascertaining such compensation is left for legislative determination . . ." 16 C.J.S., supra, page 149.

"The guarantees of individual rights contained in the Fifth, Thirteenth, Fourteenth and Fifteenth Amendments of the Federal Constitution are self-executing." 16 C.J.S., Const. Law, Sec. 50, page 151.

The Court of Appeals should hardly be free to ignore such a recognized rule of Constitutional construction. See also Rose v. State, 19 Cal. 2d 713, 123 P2d 505 (1942).

The Supreme Court has early recognized this rule of construction in "The Civil Rights Cases", U.S. v. Stanley, 109 U.S. 3, 20, 3 S.Ct. 18, 28 (1883):

> "This Amendment [Thirteenth], as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation . . ."

To fashion a relief for Fourth Amendment violations by federal officers, this Court correctly relied on the prohibitive portions of the Fourth Amendment to be self-

executing. Bivens v. Six Unknown Named Agents, supra.

This avenue of relief deserves full consideration as a recognized avenue for redress of Constitutional deprivations.

III. THERE IS FEDERAL QUESTION JURISDICTION PURSUANT TO TITLE 28 U.S.C.A. SEC. 1331 BECAUSE THE JURISDICTIONAL AMOUNT REQUIREMENT IS UNCONSTITUTIONAL CONTRARY TO THE SEVENTH AMENDMENT AND ART. III, SEC. 2 OF THE CONSTITUTION.

The Seventh Amendment provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved . . ."

Obviously, the jurisdictional amount requirement in Title 28 U.S.C.A. Sec. 1331 for federal question jurisdiction deprives many litigants of this right to jury trial required to be furnished by the Federal Government. The fact that this case is an action in equity is immaterial, for this consideration, as Sec. 1331 does not separate law and equity, but limits both.

Our position is especially borne out when the Seventh Amendment is read in conjunction with Art. III, Sec. 2 of the Constitution which states:

> "The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States . . ." (emphasis added)

This case involves exclusively federal constitutional questions. Our position is strengthened by a historical analysis concerning the enactment of Art. III, Sec. 2 which shows that the court in the past has apparently read into the Constitution what the constitutional convention of 1787 struck out.

Briefly, the minutes of the convention of 1787 show that the delegates worked from a draft submitted to it on August 6, 1787, which contained the following clause in the area covering the judiciary:

> "The legislature may assign any part of the jurisdiction above mentioned (except trial of the President of the United States) in the manner and under the limitations which it shall think proper, to such inferior courts as it shall constitute from time to time."

On August 27, 1787, the convention considered a motion to insert in the clauses setting forth the judicial structure, the following:

> "In all the other cases before mentioned the judicial powers shall be exercised in such manner as the legislature shall direct."

This motion was defeated, and the next order of business was on the question of striking out the last sentence of Section 3 of Paragraph XI of the draft, quoted above, "The legislature may assign, etc. . .", which motion to strike passed unanimously, with no negative votes being cast by any of the states.

The Constitution, as finally adopted, vests federal judicial power in the areas described in Article III, but no mention is made of any power being given to the Congress to limit any part of such jurisdiction or judicial power so vested in the inferior federal courts. (The pertinent portion of the August 6th draft is found in Appendix H. Appendix I contains the minutes pertinent to the constitutional convention's action on the draft.)

The minutes of the Constitutional Convention were not available for many years due to executive secrecy. They were first released in 1840, and there was a diversity of opinion in the early decisions of the Supreme Court as to what extent Congress could withhold jurisdiction from the federal courts in those nine classes of cases and controversies mentioned in Article III. Although Mr. Justice Story declared in Martin v. Hunter's Lessee, 1 Wheat. 304 (1816), that it was imperative upon Congress to create inferior federal courts and vest in them all the jurisdiction they were capable of receiving, by 1850, the Supreme Court unanimously rejected such contentions, Sheldon v. Sill, 8 How. 441, citing the majority of the court's earlier divided decisions on the question. Since then, a long line of decisions has held that Congress has the power to limit the jurisdiction of the lower federal courts. However, a careful reading of these cases demonstrates that the actual deliberations of the Constitutional Convention, and the expunging of the clause which gave the power to Congress to limit the jurisdiction of the lower federal courts, along with the Seventh Amendment, have never been called to the attention of this Court in any case found by petitioners.

Despite almost 180 years of judicial history confirming such Congressional power, petitioners believe that the above considerations have been overlooked. From time to time there have been indications of doubt. See Eisentrager v. Borstall, 174 F2d 961 at 966 (D.C.Cir. 1949), reversed on other grounds, 339 U.S. 763, and Battaglia v. General Motors Corp., 169 F2d 254 at 254, cert. den. 335 U.S. 887 (1948), in which the Second Circuit said:

> "While Congress has the undoubted power to give, withhold and restrict the jurisdiction of the Courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty or property without due process of law or to take private property without just compensation."

Several modern writers have recognized the general authority of Congress in the area but question whether there are not due process limits on such power, see 1 Crosskey, "Politics and the Constitution in the History of the United States", 610-620 (1953); Howland, "Shall Federal Jurisdiction of Controversy Between Citizens of Different States Be Preserved?", 18 A.B.A.J. 499 (1932); Hart, "The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic", 66 Harv. L. Rev. 1362 (1953); Pritchett, "The Policical Offender and the Warren Court", 65-69 (1958). The American Law Institute has proposed that the jurisdictional amount requirement be abolished in federal question cases, see ALI, Study of the Division of Jurisdiction Between States and Federal Courts, 24-25, 172-76

(1969), and Murray v. Vaughn, 300 F.Supp. 688 (D.C.R.I. 1969).

Petitioners believe that the basis on which the power of Congress to regulate the lower federal courts has erroneously been developed--that the power to create implies the power to limit--springs from concepts which have long since been laid to rest in numerous due process and equal protection cases. For example, in 1956 the Supreme Court held that although no one has a constitutional right to appeal, once it is created it cannot be conditioned or denied discriminatorily on the basis of financial considerations, Griffin v. Illinois, 351 U.S. 12 (1956). Other cases of this Court holding that financial considerations cannot limit access to the courts include Draper v. Washington, 372 U.S. 487 (1963), and most recently Boddie v. Connecticut, 401 U.S. 371 (1971). Wealth, or the lack thereof, is no more a constitutionally relevant consideration than "race", "color", or "creed", see McDonald v. Board of Election Commission, 394 U.S. 802-807 (1969). The time has come for facing the issue that a man's mere property status cannot be used by Congress, in the words of Mr. Justice Jackson in his concurring opinion in Edwards v. California, 314 U.S. 160, 184 (1941), to "test, qualify or limit his rights as a citizen of the United States."

The principle of these decisions, as applied here, would be: The conclusion of Congress that an individual's deprivation of constitutional rights is frivolous because it involves less than $10,000.00 is a constitutionally inadequate provision

for judicial review of his contentions when such judicial review is available to persons whose constitutional rights are the same but merely involve larger amounts. To hold otherwise would be to make expediency the test of federal jurisdiction under the view that "minor" constitutional deprivations need not be the concern of the federal courts.

It may be expedient or convenient that cases involving recognized constitutional rights are not to be heard in federal court if they involve less than $10,000.00, but if Article III, the Seventh Amendment and due process require otherwise, the federal courts must, of constitutional necessity, hear such claims arising under the Constitution and laws of the United States, regardless of value. Certainly, there can no longer be any question that mere dollars are not the measure of a citizen's constitutional protections.

To continue to assert that a monetary requirement can be constitutionally applied so as to limit access to federal courts would be to say that the protection of federal constitutional rights in federal courts is merely a "privilege" and not a "right".

> "But this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege'." Graham v. Richardson, 403 U.S. 365, 374 (1971).

See also Sherbert v. Verner, 374 U.S. 398, 404 (1963); Shapiro v. Thompson, 394 U.S. 618 (1969); Golberg v. Kelly, 397 U.S.

254, 262 (1970), and Bell v. Burson, 402 U.S. 535 (1971).

IV. THERE IS EQUITABLE JURISDICTION PURSUANT TO TITLE 28 U.S.C.A. SEC. 1343 WITHOUT REGARD TO TITLE 42 U.S.C.A. SEC. 1983.

Sufficient statutory jurisdiction of petitioners' case for injunctive and declaratory relief exists entirely under Title 28 U.S.C.A. Sec. 1343(3), which provides:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." (emphasis added)

This ground for jurisdiction was tacitly acknowledged by the Supreme Court in the footnotes of the Court's opinion in Lynch v. Household Finance Co., 405 U.S. 538, 543, footnote 7 where the Court said:

> "Section 2 of the 1866 Act was the model for §1 of the Civil Rights Act of 1871, 17 Stat. 13. See n. 9. infra. Sections 1983 and 1343(3) are direct descendants of §1 of the Act of 1871. In 1874, Congress consolidated the various federal

> statutes at large under separate titles in the Revised Statutes in order to codify existing law. In the process, the substantive provision of §1 of the 1871 Act became separated from its jurisdictional counterpart. Rev. Stat. §1979. Although the original substantive provision had protected rights, privileges, or immunities secured by the Constitution, the provision in the Revised Statutes was enlarged to provide protection for rights, privileges, or immunities secured by federal law as well.
>
> "Originally, suits under §1 of the 1871 Act could be brought in either circuit or district court. After codification in 1874, the jurisdictional grant to the district courts was identical in scope with the expanded substantive provision, Rev. Stat. § 563(12). Circuit court jurisdiction was limited to claimed deprivations of rights, privileges, or immunities secured by the Constitution or by any Act of Congress 'providing for equal rights.' Rev. Stat. §629(16). In 1911, when Congress abolished the circuit courts' original jurisdiction and merged the two jurisdictional sections into what is now §1343(3), the 'equal rights' limitation was retained in the revised jurisdictional grant. Act of Mar. 3, 1911, 36 Stat. 1087. Despite the different wording of the substantive and jurisdictional provisions, when the §1983 claim alleges constitutional violations, §1343(3) provides jurisdiction and both sections are construed identically. Douglas v. City of Jeannette, 319 U.S. 157, 161, 63 S.Ct. 877, 880, 87 L.Ed. 1324."

The Supreme Court went on to imply in Lynch that Title 28 U.S.C.A. Sec. 1343 jurisdiction is sufficient standing alone when it stated at 405 U.S. page 547 in footnote 13:

> "The plaintiffs in Hague brought suit in a federal district court to enjoin enforcement of city ordinances prohibiting the distribution of printed matter and the holding of public meetings without a permit. They alleged that the ordinances violated the union members' right of free speech and assembly. Both the District Court and the Court of Appeals found jurisdiction under §§ 1331 and 1343(3). This Court reversed as to jurisdiction under §1331, since the plaintiffs had failed to establish the requisite amount in controversy. Although no opinion commanded a majority, jurisdiction under §1343(3) was upheld. Mr. Justice Roberts, writing the lead opinion, expressed the view that the reference in §1343 to 'any right, privilege or immunity secured by the Constitution' should be interpreted to cover only alleged violations of the Privileges and Immunities Clause of the Fourteenth Amendment. In Monroe v. Pape, 365 U.S. 167, 170-171, 81 S.Ct. 473, 457-476, 5 L.Ed2d 492, we rejected such a narrow reading of similar language in §1983." (emphasis added)

The Court also suggested that 42 U.S.C.A. Sec. 1983 was not intended to limit 28 U.S.C.A. Sec. 1343 jurisdiction and that Sec. 1343 is not dependant on Sec. 1983 and that the change in the Statute in the Act of 1875 was "sneak" legislation. Lynch v. Household Finance, supra, page 548 at footnote 14:

> "'[A] study of the history of the bill as revealed by the Congressional Record yields no reason for its enactment at that time and may even be said to raise a strong presumption that it was 'sneak' legislation. It was originally introduced in the House of Representatives in the form of a bill to amend the removal statute.' Chadbourn & Levin, Original Jurisdiction of Federal Questions, 90 U.Pa.L. Rev. 639, 642-643 (1942). Nonetheless, the passage of the Act, despite the lack of debate, has been regarded as the 'culmination of a movement . . . to strengthen the Federal Government against the states.' F. Frankfurter & J. Landis, The Business of the Supreme Court 65 n. 34 (1928). See also Maury, The Late Civil War, Its Effect on Jurisdiction, and on Civil Remedies Generally, 23 Am.L.Reg. 129 (1875).

Further, "rights, privileges or immunities secured" means all of the Constitution. See Lynch v. Household Finance, supra, page 549 at footnote 16, and U.S. v. Price, 383 U.S. 787 (1966).

Thus, since Petitioners seek only equitable and declaratory relief, Federal jurisdiction can be conferred by Title 28 U.S.C.A., Sec. 1343(3) alone, without Title 42, Sec. 1983, especially with the alleged violations of the "self-executing" provisions of the United States Constitution.

See also Dicta to similar effect in Hague v. C.I.O., 307 U.S. 496, 529,530 (1939).

CONCLUSION

For the above reasons the Court must clarify the bases for jurisdiction available to redress victims of Constitutional deprivations. A Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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May 21st, 1976.

A P P E N D I X

APPENDIX A

CONSTITUTIONAL PROVISIONS AND STATUTES

ARTICLE III
UNITED STATES CONSTITUTION

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; --to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;-- to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the

supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

FIFTH AMENDMENT TO THE
UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SEVENTH AMENDMENT TO THE
UNITED STATES CONSTITUTION

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, then according to the rules of common law.

FOURTEENTH AMENDMENT TO THE
UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 28 U.S.C.A. Sec. 1331

(a) The district courts shall have original jurisdiction of all civil actions wherein the manner in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

TITLE 28 U.S.C.A. Sec. 1343

The district courts shall have original

jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

TITLE 42 U.S.C.A. Sec. 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation

of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

ARTICLE 6243f, Sec. 19
VERNON'S TEXAS CIVIL STATUTES

[N]o member of either of said Departments or of said Fund shall ever be entitled to any refund from said Fund on account of the money deducted from that amount of their pay . . . which money is in itself declared to be public money, and the property of said Fund for the benefit of the members qualifying for benefits, and their beneficiaires.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MUZQUIZ, et al. : CIVIL ACTION

V. :

CITY OF SAN ANTONIO, et al. : NO.SA72CA271

O R D E R

AND NOW TO WIT, this 1st day of July 1974, for the reasons set forth in the Opinion filed concurrently herewith, it is ORDERED, ADJUDGED AND DECREED.

1. That plaintiffs' Motion for Summary Judgment as to liability be and it is hereby DENIED.

2. That the defendants' Motion for Summary Judgment be and it is hereby in all respects GRANTED.

BY THE COURT:

/s/ Thomas J. Clary
Thomas J. Clary, Senior Judge
(Sitting by Special Designation)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MUZQUIZ, et al. : CIVIL ACTION

V. :

CITY OF SAN ANTONIO, et al. : NO. SA72CA271

O P I N I O N

This is a class action brought under 42 U.S.C. §§ 1983, 1985 and 28 U.S.C. § 1343 (3) and (4) pursuant to 28 U.S.C. §§ 2201 and 2202 seeking an accounting, restitution, and injunctive and declaratory relief on behalf of former policemen and firemen of the City of San Antonio against the City of San Antonio and the Firemen and Policeman's Pension Fund Board of Trustees. The class represents those who have contributed to the Fire and Police Department Pension Fund and who subsequently left the employ of their respective departments and whose pension monies were not then refunded to them pursuant to Article 6243 f, Section 19, Vernon's Texas Civil Statutes[1] which bars

1. ". . . [N]o member of either of said Departments or of said Fund shall ever be entitled to any refund from said Fund on account of the money deducted from their pay for the benefit of the Pension Fund which money is itself declared to be public money, and the property of said Fund for the benefit of the members qualifying for benefits and their beneficiaries." Section 19 amended by Acts 1971, 62nd Leg., p. 42, ch. 19 § 7, eff. Aug. 30, 1971.

such refunds. The plaintiffs seek a declaration of the unconstitutionality of Article 6243 f, Section 19 as a violation of Due Process and Equal Protection under the Fifth and Fourteenth Amendments, and the Supremacy Clause, Article VI, of the Constitution as well as constituting a Bill of Attainder and Inverse Condemnation. This matter is before the Court on a Rule 56 Motion by Defendants for Summary Judgment and a Cross-Motion by Plaintiffs for Partial Summary Judgment as to liability. A Hearing has been held and a Case Stated submitted by the parties.

I. JURISDICTION

Although the Defendants have conceded Jurisdiction[2] for the purposes of their Motion for Summary Judgment, the Court nevertheless believes the clear command of City of Kenosha v. Bruno, 412 U.S. 507 (1973) to compel us, sua sponte, to dismiss the City of San Antonio as a party. As the Court said in Kenosha, "'It is the duty of the Court to see to it that the jurisdiction of the [district court] which is defined and limited by statute, is not exceeded.'" at 511 citing Louisville and Nashville R. Co. v. Mottley, 211 U.S. 149, 152 (1908). That component of jurisdiction which concerns us here goes to the question of equitable jurisdiction against municipal corporations under § 1983 as a possible exception to the holding of Monroe v. Pape, 365 U.S. 167 (1961) with its bar to claims for damages against municipal corporations in a § 1983 action.

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2. Defendant's Motion for Summary Judgment at Page 5.

The Court in Kenosha held that

> "We find nothing in the legislative history discussed in Monroe, or in the language actually used by Congress to suggest that the generic word 'person' in §1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them. Since, as the Court held in Monroe, 'Congress did not undertake to bring municipal corporations within the ambit of' § 1983, id., at 187, they are outside of its ambit for purposes of equitable relief as well as for damages." at 513 (emphasis added).

In this regard, we have thus reconsidered our decision as to jurisdiction at the hearing which was based on Judge Seals' opinion in Walker v. City of Houston, 341 F.Supp. 1124 (S.D. Tex.) (1972)3 rendered prior to Kenosha. What has been said as to § 1983 actions and municipal corporations would apply as well as to actions under 42 U.S.C. § 1985, Monroe v. Pape, supra; Dodd v. Spokane County, 393 F.2d 330 (9th Cir.)(1969); Mack v. Lewis, 298 F.Supp. 1351 (D.C. Ga.) (1969), and would hence also bar the instant claim under § 1985 as to the City of San Antonio.

Nevertheless, Jurisdiction still obtains

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3. Walker represented an earlier posture of this case wherein Judge Seals held that he had jurisdiction under both 28 U.S.C. & 1331 and 1343 of the subject matter but that venue was improperly laid as to, inter alia the instant plaintiffs. The case was accordingly transferred to this District as to the instant parties. Id. at 1133-1134.

under §§ 1983 and 1985 as to the Pension Fund and its individual members, as it expressly is not a municipal entity under Texas law, as has been, in fact, acknowledged by the defendants in their Trial Brief at Page 6.[4] Moreover, the relief sought in this case is predominatly equitable in nature[5] and would thus seem to fall

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4. See, their citation to that effect from another case arising from the operation of the instant Pension Fund, Bolen v. Board of Firemen, Policemen, and Fire Alarm Operations Trustees of San Antonio, Texas. Tex. Civ. App. 308 S.W. 2d 904 at 905:

"The Board is not the State, nor is it a county, a city, a town or any other political corporation or subdivision of the State. The Board is simply a group of statutory trustees charged with management of the Pension Funds of the Firemen, Policemen and Fire Alarm Operators of the City of San Antonio." Id.

The defendants, on the other hand, have nowhere argued the lack of any state action, and for the purposes of § 1983 jurisdiction, we find that the above-named statute, Article 6243f, creates sufficient state nexus, see, e.g. Sections 1, 4-6, 19 ("public money"),
--continued--

5. The Fifth Circuit in Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (1969) has held, for example, that "back pay is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy. . ." at 1125.
--continued--

within the continuing sub silentio exceptions both to Monroe and its progeny Kenosha. See, e.g., Cleveland Board of Education v. LeFleur, No. 72-772 (1974), 42 U.S.L.W. 4188; Vlandis v. Kline, 412 U.S. 441 (1973); see also Harkless v. Sweeney Independent School District, 427 F2d 319 (5th Cir.)(1970), cert. den. 400 U.S. 991; Antieu, Federal Civil Rights Acts (1971) § 37, supp. at 17, n. 20.

II. CLASS ACTION

For the purposes of Rule 23, we shall denominate the class in question as constituting all those living former policemen and firemen of the San Antonio Police and Fire Departments who left the employ of

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4.--continued--
21 (City of San Antonio must make up deficits) along with its status as a legislatively-created entity, so as to confer jurisdiction upon the Court.

However, the plaintiffs have also alleged jurisdiction under 28 U.S.C. 1331 and the defendants have contested the jurisdictional amount, Zahn v. International Paper Co., 414 U.S. 291 (1973); nevertheless, we need not reach this question (see also III) as we find proper jurisdiction under § 1983 and 28 U.S.C. 1343 (3) and (4), supra.

5.--continued--
See, generally, 27 Am. Jur. 2d Equity, §§ 10, 14, 30, 109-112; 30 C.J.S. Equity § 39, 40, 41 (Accounting Declaratory and Injunctive Relief), § 652 (Restitution); DeFuniak, Handbook of Modern Equity (2nd Ed.) Sec. 103 (Accounting).

the police and fire departments respectively prior to becoming eligible for retirement benefits[6] but who pursuant to the Article 6243f Section 19 contributed monies which were not returned to them upon their departure. The Plaintiffs have also sought as an article of relief in their Fourth Amended Class Action (Docket Entry No. 142) to act on behalf of the "widows and heirs or legal representatives of all deceased former members of the San Antonio Police and Fire Departments who were separated from the police or fire department prior to becoming eligible for retirement" and who while living were also denied a refund of their contributed pension monies. Since there are no representatives of said class among the named Plaintiffs, the Court finds that the requirements of Rule 23 that "one or more members of a class may sue" are clearly not met, Bailey v. Patterson, 369 U.S. 31 (1962), 7 Wright and Miller, Federal Parctice and Procedure § 1761; nor, correspondingly, do we believe that the requirement of 23(a)(4) can be met that "the representative parties will fully and adequately protect the interests of the class" since the named parties are not "representative" of the widows and children at all. Cf. Huff v. Cass, No. 71-2842, Slip Opinion at 9 (5th Cir.)(1973) and see Wright and Miller, supra at § 1798.

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6. It is noteworthy that the plaintiffs were eligible while members of the Police and Fire Departments for all other benefits therein available. For example, the plaintiffs and their dependents were covered against death and disability Article 6243f, supra, Sections 10-13, which benefits were also lost upon resignation.

The defendants have nowhere contested the existence or propriety of the class of former policemen and firemen and as to them we hold that all the prerequisites to a class action under Rule 23(a) have been met: numerosity; common questions of law and fact; representative claims and defenses; and parties who will adequately represent the interest of the class.[7] Moreover, owing to the equitable character of the relief sought, supra, with its emphasis on declaratory and injunctive relief, Advisory Committee's Note to Rule 23, 39 F.R.D. 98,

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7. See, in this regard, Walker, supra at 113:

"All four of the necessary conditions of subdivision (a) of Rule 23 are met. The number of all prior members of each of the various funds is so great that it would be impracticable to attempt to join all of them. The constitutional issues raised with respect to each fund are common to all prior members of each fund. The prior members of each fund represent a distinct class and at least one member of each such class is a named party-plaintiff. The claims of the named party-plaintiffs are typical of the claims of their respective classes, and it appears that these plaintiffs, as representative parties, will fairly and adequately protect the interests of their class."

102,[8] of a civil rights nature,[9] 39 F.R.D. id.,[10] 7a Wright and Miller supra, § 1775

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8. "Subdivision (b)(2). This subdivision is intended to reach situations where a party has taken action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief 'corresponds' to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class provided it is based on grounds which have general application to the class."

9. See, Johnson v. Georgia Highway Express, supra, and Robinson v. Lorillard Corp., 444 F2d 791 (4th Cir.) (1971), cert. dism'd. 404 U.S. 1006, 1007; ". . . the award of back pay, as one element of the equitable remedy, conflicts in no way with the limitations of the Rule 23(b)(2) . . . [citing Bowe v. Colgate-Polmolive Co., 416 F.2d 711 (7th Cir.) (1969)]" per Sobeloff, C.J.

10. "Illustrative are various actions in the Civil Rights field where a party is charged with discriminating unlawfully against a class. . ."

at 24, § 1776 et seq., we believe the instant litigation to be most appropriately characterized under 23(b)(2).[11] There can be little question that the instant Pension Fund has "acted or refused to act on grounds generally applicable to the class" where a "common regulatory scheme" is involved, Almenares v. Wyman, 334 F.Supp. 512 (S.D. N.Y.)(1971), modified 453 F.2d 1075 (2nd Cir.), cert. den. 405 U.S. 944; Ware v. Estes, 328 F.Supp. 657, aff'd per curiam 458 F2d 1360 (5th Cir.), cert. den. 409 U.S. 1027, such as the instant statute, and where the relief sought is both of a "final" injunctive nature, 7A Wright and Miller, supra § 1775 at 21, and of a "corresponding" declaratory nature which would settle the question of the legality of the above statutes as to the class.

Accordingly, as a Rule 23(b)(2) class action, the instant case does not fall within the ambit of Eisen v. Carlisle and Jacquelin, et al., No. 73-203, 42 U.S.L.W. 4804, with

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11. Rule 23(b): "(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . ." Id.

its notice requirement for 23(b)(3) actions.[12]

III. STATEMENT OF THE CASE

The nub of this case is the consitutionality of Article 6243f, Section 19 and the factual issues if any are purely ancillary to that determination and will be discussed infra where appropriate. In this regard, we concur with the opinion of our brothers of the Judicial Panel on Multidistrict Litigation who found "that the actions in this litigation involve predominatly, if not entirely, questions of law . . ."[13] Moreover, while the defendants have brought the instant motion under Rule 56(b), the plaintiffs have themselves agreed as to the lack of dispute of any material fact and have submitted their own Cross Motion for Partial Summary Judgment as to Liability (Docket Entry No. 153) wherein they state that "there is no disputed material fact in issue.[14] Nevertheless, the Court

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12. In Eisen, the Supreme Court noted at fn. 14: "We are concerned here only with the notice requirements of subdivision (c) 42 U.S.L.W. 4810 (2), which are applicable to class actions maintained under subdivision (b) (3). By its terms subdivision (c) (2) is inapplicable to class actions for injunctive or declaratory relief maintained under subdivision (b) (2)."

13. Docket No. 131, dated June 13, 1971, Slip Opinion at 2.

14. At 1.

must make its own inquiry in this regard. Pioneer National Title Insurance Co. v. American Casualty Co., 459 F. 2d 963 (5th Cir.)(1972); 6 Moore's Federal Practice, ¶ 56. 13 et seq.; 7A Wright and Miller, supra at § 2720 et seq.

Having made our inquiry we have determined only one possible area of dispute of a material nature,[15] to wit, the underlying considerations, e.g. dangerousness and personal safety, which might justify the differing classifications of police and firemen as to the return of pension fund monies in differently-sized Texas cities,[16] and in that aspect, we further determine that there is another rule of law that governs entirely so that the question need not be reached.

As to this question, we believe that we

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15. See also, n. 4 at 3. Additionally, there appear to be other disputes of a non-material nature that are not relevant to the instant disposition of the case. For example, the parties differ in the area- and import-of the named plaintiffs' knowledge upon joining the force that they would not be refunded their pension monies upon departure prior to eligibility for pensions. This in an area of no bearing as to constitutional issues upon which this case turns.

16. The plaintiffs have alleged that San Antonio along with Dallas, Houston, and El Paso are the only cities in Texas that refuse to refund pension fund monies to police and fireman.

are faced with neither the abrogation of a fundamental constitutional right, Rodriquez v. San Antonio Independent School District, 411 U.S. 1 (1973), Baker v. Carr, 369 U.S. 186, 229-237 (1962), which would warrant the application of the Equal Protection "compelling state interest" test, nor for the reasons discussed below and at V, infra, the application of the "less strick scrutiny" test of "rationality" which, would, in turn, elevate this area of dispute to a level of materiality necessary to the resolution of the case. We do not reach this question because we are convinced that prior Supreme Court holdings clearly mandate that "the Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite, "McGowan v. Maryland, 366 U.S. 420, 427, and that "A State, of course, has a wide discretion in deciding whether laws shall operate statewide or shall operate only in certain counties, the 'legislature having in mind the needs and desires of each' [citing to Salsburg v. Maryland, 346 U.S. 545 (1953)]". Griffin v. School Board, 377 U.S. 218, 231 (1963).

The Court added "We find no invidious discrimination here [again citing to Salsburg v. Maryland, supra, at 550-551 (1953]", id. This holding was interestingly enough, cited to another case also involving disparate governmental treatment of differing geographical entities, San Antonio Independent School District v. Rodriquez, supra at 54 (1973). The Court in Rodriquez affirmed its belief in the continuing vitality of the McGowan holding and asserted that it "has never found in the Equal Protection Clause any per se rule of 'territorial uniformity'[citing McGowan, supra, Griffin

v. School Board, supra, (1963); Salsburg v. Maryland, supra and Board of Education of Muskogee v. Oklahoma, 409 F.2d 665, 668 (10th Cir.)(1969)]."

Accordingly, since we hold infra as a matter of law, that plaintiffs have demonstrated no deprivation of their Right to Travel, the defendants do not have to demonstrate any "compelling state interest" for the classification of Texas cities by size as to the refundability of Police and Firemen's Pension plans.

Secondly, the rationale of the differing pension fund classifications of the category of intra-San Antonio municipal employees - between policemen and firemen on one hand and all other city employees on the other - is itself within the ambit of the less strict scrutiny test of rationality and legitimate state purpose, for we consider it clear that such a classification creates no "suspect" class infra, on the basis of race or alienage, for example. And as to intra-San Antonio City employees, there is no factual dispute. The plaintiffs have not contested defendants' assertions of the "rationality" of such a classification as based on the assumption that within the governmental family of the City of San Antonio, policemen and firemen do, indeed, perform more hazardous work than other municipal employees and therefore deserve greater benefits; that those greater benefits depend upon greater income - and lesser expenses - to the instant pension fund and that, accordingly, the no-refund provision is a rational and logical component of the goal of reducing expenses. See, infra at 18.

IV. DUE PROCESS

We now turn to what is perhaps plaintiffs' strongest constitutional claim - that Article 6243f, supra violates Due Process of Law as a deprivation of property without compensation therefor. If this were a case of first impression, this Court might possibly have arrived at a different result; however, the plaintiffs are asking us to reverse 85 years of unbroken Constitutional law at the Federal level beginning at the Supreme Court with the landmark case of Pennie v. Reis, 132 U.S. 464 (1889) 33 Law.Ed 426[17] and culminating in

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17. Pennie v. Reis is itself antedated by even more venerable cases whose roots go back to the founding of the Republic. See, Walton v. Cotton, 60 U.S. 659, 19 How. 355 (1857) holding that Revolutionary War pensions were in the nature of a "bounty"; see also, U.S. ex rel. Burnett v. Teller, 107 U.S. 352 (1882) (Mexican War Pensions); Frisbie v. U.S., 157 U.S. 160, 166 (1895) (Civil War Pensions). While historically noteworthy, we recognize, of course, that the claims involved are not entirely, apposite in that there is no question involved of the public or private status of "contributions" from salary.

Flemming v. Nestor, 363 U.S. 603, 611 (1959)[18] and reiterated in decisions of the 1st,[19] 3rd,[20] 5th, [21]

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18. Intervening decisions to like effect are Lynch v. United States, 292 U.S. 571 (1934) (dictum) ("Pensions . . . are gratuities . . . and the grant of them creates no vested right. The benefits conferred . . . may be redistributed or withdrawn at any time in the discretion of Congress. Id. at 577 and Dodge v. Board of Education, 302 U.S. 74 (1939) (State Pension statute) (" . . . the payments are gratiuities . . . (and) the grant of them creates no vested right." Citing to Pennie and Lynch, supra.)

19. MacLeod v. Fernandez, 101 F. 2d 20, 22-25 (1st Cir.) (1938), cert. den. sub nom, Toste v. MacLeod, 308 U.S., 561 (1939) (Compulsory contributions create no vested rights and the monies are in the nature of public funds).

20. Rafferty v. United States, 210 F. 2d 934, 936 (3rd Cir.) (1954) (No denial of Fifth Amendment Due Process and no creation of vested rights in withholding of pension fund monies in case of compulsory contributions citing to Pennie as "still the leading case on the subject" at 936).

21. Morgan v. United States, 115 F. 2d 426, 427 (5th Cir.) (1941) (World War I Death benefits) ("bounty" and "indistinguishable from a pension").

6th,[22] 9th,[23] and District of Columbia[24] Circuits as well as in the District Courts

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22. In Re Goodwin, 57 F. 2d 31, 32 (6th Cir. (1932) (Firemen's pension - voluntary contributions supplemented by tax monies) rights which cannot be taken away by subsequent legislation." citing to Pennie)

23. Anderson v. United States, 205 F. 2d 326, 328-329 (9th Cir.) (1953) (Civil Service Retirement Fund) (" . . . sums 'deducted' are never in fact paid . . . but are retained by the government as general public funds in which the employees can have no right (citation to Pennie, Griffith v. Rudolph, infra, MacLeod v. Fernandez, supra; Dodge v. Board, supra; in Re Goodwin, supra.).

24. Stouper v. Jones, 284 F. 2d 240, 242-243 (C.A.D.C.) (1960) (Civil Service Retirement Fund) (No vested right citing to Flemming v. Nestor, supra and its Due Process holding), Griffith v. Rudolph, 298 F. 672 (C.A.D.C.) (1924) (Retirement insurance fund) (No vested right citing to Pennie).

of the country[25] and in the majority of state courts that have considered this

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25. Robbins v. Police Pension Fund, 321 F. Supp. 93, 97 (S.D.N.Y.) (1970) (Police Pension Fund) (No vested right to a pension and no 14th Amendment Due Process violation); Price v. Folsom, 168 F. Supp. 392, 398-399 (D.C.N.J.) (1959) (Pension is gratuity and denial constitutes no deprivation of Due Process); Steinburg v. U.S., (163 F. Supp. 590 (Ct. Cl.) (Annuity) (gratuity citing to Dodge, supra); Allen v. U.S., 148 F. Supp. 817, 818 (S.D. Ill.) (1957) (Federal pension)(gratuity with no vested rights); Gibney v. United States, 146 F. Supp. 135, 140 (S.D. Cal.) (1956) (Compulsory public retirement fund) (no vested rights); In Re Hoag, 227 F. 478, 479-480 (S.D.N.Y.) (1915) (Augustus Hand, J.) (Municipal pension fund) (no vested right).

matter.[26]

Pennie v. Reis also involved putative contributions from salary to a police pension fund. In Pennie, the plaintiff sued for the benefits from the fund and similarly raised a Due Process argument. The plaintiffs here have attempted to distinguish Pennie

26. See, e.g., Illinois. Blough, et al. v. Ekstrom, et al., 144 N.E. 2d 436, Appellate Court of Illinois. 1957
New Jersey. Fehrer v. Board of Trustees, Public Employees Retirement System, 172A. 2d 445, Superior Court of N.J. 1961;
West Virginia. State ex. rel. Fox v. The Board of trustees of the Policemen's Pension or Relief Fund of the City of Bluefield, et al., 135 S.E. 2d 262, Supreme Court of Appeals of West Va. 1964;
Idaho. Hanson, et al. v. City of Idaho Falls, 446 P.2d 634, Supreme Court of Idaho. 1968.
New Jersey. Backer v. Crane, 184 A. 346, Sup. Ct. of N.J.; as well as other cases in Colorado, Iowa, Kansas, Massachusetts, Michigan, Missouri and Nebraska. Jurisdictions holding otherwise can be found in California, Georgia, Ohio, Oklahoma, Pennsylvania, Tennessee, Washington, See, generally, 52 A.L.R. 2d 437 and Supp.

Texas cases holding the lack of vested rights and the status of fund as public monies are:

City of Dallas v. Trammel, 101 S.W. 2d 1009, 112 ALR 997, (Tex. Sup. Ct.); Richard R. Devon v. Firemen and Policemen's Pension Board of Trustees, 443. S.W. 2d
--continued--

from the instant case on the basis that they are only seeking the return - not the benefits - of what they assert to be their paid-in pension monies. Nevertheless, such a claim is a distinction without a difference and must fail, for the rationale of Pennie and its clear holding is that such monies are inextricably public monies[27] whose disposition is wholly at the discretion of the State and which forever retain that character:

> ". . . in point of fact, no money was contributed by the police officer out of his salary. . . [such monies] the State retained in its possession for the creation of this very fund . . . the State impaired no absolute right of property in the police officer . . . The Fund . . . was subject to

26. --continued--
598, (Tex. Sup. Ct. 1969); Byrd v. City of Dallas, 6 S.W. 2d 738, 118 Tex. 28 (1928); City of Dallas v. Hoskins, 193 S.W. 2d 533, ref. n.r.e. (1946); Reagan v. Board, 307 S.W. 2d 958, (1957) no writ hist.; Gaines v. Shank, 312 S.W. 2d 268, ref. n.r.e. (1958); Jud v. City of San Antonio, 313 S.W. 2d 903, writ refused (1958); Gould v. City of El Paso, 440 S.W. 2d 696, ref. n.r.e. (1969); City of Orange v. Chance, 325 S.W. 2d 838, no writ hist. (1959).

See also 60 Am. Jur. 2d, "Pensions and Retirement Funds" § 49; 62 C.J.S., Municipal Corporations § 588, at 1194.

27. The public fund status of the instant fund is expressly recognized by statute: See Section 19 of Article 6243f: ". . . which [pension fund] money is itself declared to be public money."

> change or revocation at any time, at the will of the legislature. Until the particular event should happen upon which the money or a part of it was to be paid, there was no vested right in the officer to such payment. His interest in the fund was, until then, a mere expectancy created by the law, and liable to be revoked or destroyed by the same authority . . . Such being the nature of the intestate's interest in the fund. . . there was no right of property in him of which he or his representative has been deprived." Id. at 470-472, 33 L. Ed. at 429-430 (emphasis added).

Given the acceptance of that rationale, then it must follow in the instant case that the monies involved were never the property of the plaintiffs in the first place; and, it must also follow, the plaintiffs cannot properly have returned or restored to them that which they did not own in the first place. Consequently, the plaintiffs cannot complain of a deprivation of property without compensation or due process of law, as the money was never "private" at any time.[28]

In Flemming v. Nestor, supra, the Supreme Court was faced with a claim that the denial of Social Security benefits was a Constitutional violation and held that not "every defeasance of 'accrued' interests [is] violative of the Due Process Clause of the Fifth

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28. Therefore owing to the public character of the monies we intimate no opinion as to the vesting procedures of non-public pension funds.

Amendment." Id. at 611. Price v. Folsom, supra, also involved a claim to Social Security benefits and we believe the District Court's words are particularly applicable to the instant case as well:

> "It is a general rule that pension funds and payments made therefrom are a gratuitous allowance by the particular governmental body creating and authorizing them. As a consequence, a beneficiary of such a pension does not acquire a vested right to any payments therefrom except those which have actually become due and owing the beneficiary. This is so whether the payments to the fund are voluntary or compulsory [citing to MacLeod v. Fernandez, supra]" Id. at 398.

We also consider it significant in this regard that the Internal Revenue Service has declared that the pension payroll deductions are not taxable for the reason that, technically, the contributions are not a deductible item because they should not be shown as income in the first place."[29]

We, therefore have no other alternative than to dismiss plaintiffs' Due Process claim on the basis of the unanimous authority of Federal courts over nearly the last 100 years.

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29. Letter of the Internal Revenue Service dated April 21, 1958, addressed to A.G. Campa, Secretary, Firemen, Policemen and Fire Alarm Operators Pension Fund of San Antonio and attached to the Case Stated as Exhibit C.

In this we re-affirm and renew the validity of the opinion of the Third Circuit as expressed in Rafferty v. United States, supra at 936, speaking through Goodrich, Hastie and McLaughlin, Circuit Judges, that "the law is clear that . . . Pennie v. Reis, [citation] is still the leading case on the subject." The rule is harsh, perhaps, but we feel constrained in this case to apply the law as it is given to us, stare decisis, for it has heretofore admitted of no exceptions and no modifications, and plaintiffs have shown us no examples thereof or compelling reasons that would overcome "one of the first prinicples of constitutional adjudication - the basic presumption of constitutional validity." Rodrizuez, supra at 55 (concurring opinion of Stewart, J.); McGowan v. Maryland, supra at 425. It must also follow that plaintiffs' claims of a violation of their rights to procedural Due Process by the absence of notice and hearing must also fail for the same reasons - there can be no need for such a requirement if the property involved is by statute, supra, and law, public, not private, property; Cf. Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972).[30] And finally, owing to the public character of the monies, the plaintiffs' claim of Inverse Condemnation must also be dismissed.

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30. Nor, do we believe, that the case falls within the categorv of the deprivation without hearing of an entitlement or benefit necessary to sustain life. Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

V. EQUAL PROTECTION

A. Rationality of Classification

Plaintiffs have propounded an aggregation of Equal Protection claims which, individually and collectively, are almost entirely insubstantial. First, as we have seen supra, the plaintiffs have asserted that the present statutory classification of San Antonio police and firemen has created in some way a constitutionally "suspect class." Such a contention is absurd, for the only classifications that the Supreme Court has denominated "suspect" pertain to generally immutable characteristics present at birth, such as race, McLaughlin v. Florida, 379 U.S. 184 (1964); national ancestry, Korematsu v. United States, 323 U.S. 214 (1944); alienage, Graham v. Richardson, 403 U.S. 365 (1971); and, perhaps, illegitimacy, Weber v. Aetna Casualty and Surety Co., U.S. 164 (1972) and sex, Frontiero v. Richardson, 411 U.S. 677 (1973). See also Nowak, "Realigning the Standards of Review under the Equal Protection Guarantee" 62 Georgetown L.J. 1071, 1072-1082; "The Supreme Court - Forward," 86 Harvard L. Rev. 1, 10-20 (1972; "Developments in the Law-Equal Protection," 82 Harvard L. Rev. 1065, 1124-1127 (1969).

Plaintiffs have also urged that the classificatory distinctions between (a) San Antonio Police and Firemen and all other city employees and (b) between San Antonio Police and Firemen (as well as Police and Firemen in Houston, Dallas and El Paso) and the police and firemen in all other Texas cities and municipalities works a deprivation of Equal Protection. As to the latter, we have noted, supra, that the States

have the inherent right to make such distinctions based on differing geographical areas absent the infringement of a fundamental right - which is not asserted in this aspect of the case (see discussion of the right to travel infra). As to the former, the plaintiffs have, in the Court's opinion, impliedly conceded the defendants' claims[31] that San Antonio police and firemen do, indeed, possess more hazardous jobs for which they are commensurately rewarded, inter alia, by more liberal pension fund benefits (as well as the non-payment of income taxes, supra, on their pension monies in distinction to other city employees) such as higher payments and more extensive disability coverage and that, therefore, "[the] fund requires greater income if the higher pensions and more liberal coverages are to be met."[32] The defendants do not dispute the facts here nor that this in itself bears a rational realtionship to what the defendants claim is a valid state

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31. Defendents' Answer to Plaintiffs' Cross Motion for Partial Summary Judgment (Docket Entry No. 156) at 4.

32. Id.

objective,[33] Weber v. Aetna Life Insurance Co., supra at 172, Turner v. Fouche, 396 U.S. 346, 362 (1969), but urge instead, that there is some kind of per se constitutional prohibition against creating a "distinctive class" - which is wholly erroneous - and in doing so acknowledge, by impliaction, that the instant funding structure does work to protect the fiscal integrity of the fund: "And, if it is true that the pension of the firemen and policemen in San Antonio is 'very substantially greater,' it is nevertheless an insufficient reason for creating a 'distinctive class' . . Plaintiffs conclude that the protection of the fiscal affairs will not provide a sufficient justification nor will it raise a compelling state interest." Plaintiffs' Reply to Defendants' Answer to Plaintiffs' Cross-Motion for Summary Judgment (Docket Entry No. 159 filed February 28, 1974) at 4 and 5. What, apparently, the plaintiffs have in mind is the line of cases holding that where a fundamental Constitutional right is infringed upon (which is not

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33. Nor do the plaintiffs dispute other related goals of pension funds. See, e.g., Plaintiffs' Cross Motion for Partial Summary Judgment at 18:

"While not clearly enunciated in the statutes, there are valid state objectives in creating pension funds. For example, such benefits may act as an inducement to prospective applicants for employment. Such benefits are accepted methods of providing for old-age benefits which the state may otherwise be compelled to provide; and such benefits do compensate employees for loyalty and longevity."

the case here), cf. Dandridge v. Williams, 397 U.S. 471 (1970), the State may not raise the protection of its fiscal affairs as a justification thereof.

Clearly, the purpose of the act is to protect those police and firemen who presently and prospectively qualify for benefits and those whose families presently and prospectively are entitled to benefits; therefore, it is patent that the fund must protect itself from a "drainage" of monies away from that purpose to those not within its ambit of coverage - specifically to former members who have not qualified for its benefits either of pension or disability nature and who voluntarily chose to remove themselves by resignation from the protection of the statute.

The distinctions between city employees here then not only have some "relevance" to the purpose of the classification, Rinaldi v. Yeager, 384 U.S. 305, 309 (1966); Royster Guano Co. v. Virginia, 253 U.S. 412 415; Note, "Legislative Purpose, Rationality, and Equal Protection," 82 Yale L.J. 123 et seq., (1972); 16 Am. Jur. 2d Constitutional Law § 494 et seq., but they the very raison d'etre of the classification - and we consider this a particularly apt case for the application of the rule of judicial deference to legislative classifications, Dandridge v. Williams, supra at 485, especially when they are of a peculiarly local nature. Carmichael v. Southern Coal and Coke Co., 301 U.S. 495, 510 (1936); 82 Harvard L. Rev. supra at 1128:

> "Judicial deference to the legislature in instances of economic regulation is sometimes explained by the argument

> that the rationality of a classification may depend upon 'local conditions' about which a local legislative or administrative body would be better informed than a court. Consequently, lacking the capacity to inform itself fully about the peculiarities of a particular local situation, a court should hesitate to dub the legislative classification irrational."

B. RIGHT TO TRAVEL

The plaintiffs argue, in essence, that since a policeman or fireman must remain on the police or fire force, respectively, for twenty (20) years in order to obtain pension benefits (however, there is no durational requirement as to other benefits for sickness, death, or disability) and since he obtains no refund of what they allege to be his paid-in monies, these requirements therefore infringe upon his constitutionally guaranteed right of interstate travel. We believe that plaintiffs' argument here is entirely without merit, and that they have travelled themselves far beyond the outer limits of any Right to Travel theory that has been recognized by any court in this land. We further believe that they have fundamentally misapprehended the Supreme Court's rulings in such cases as Memorial Hospital v. Maricopa County, No. 72-847,

42 U.S.L.W. 4277 (1974)[34] and Dunn v. Blumstein, 405 U.S. 330 (1972) which addressed themselves to the validity of durational residency requirement; the issue in this case is the durational requirement alone - there is no mention in statute, in practice or in the plaintiffs' pleadings that the grant of a pension is conditioned upon residency. The focus of the law is on the departure from the job - not from the geographic entity of the City of San Antonio. Presumably the lack of refund applies whether one goes down the street or to Tahiti.

We hold therefore, that the plaintiffs' right of interstate travel is not in any way "invidously" infringed upon by the operation of the statute so as to "trigger" the application of the compelling state interest test. Memorial Hospital, supra at U.S.L.W. 4279-4281.

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34. The Supreme Court itself is still struggling with, in Justice Marshall's words Memorial Hospital, supra at 4280 "the ultimate parameters of the Shapiro penalty analysis" in terms of such issues of durational residency as "the validity of waiting - period of residence requirements determining eligibility [inter alia] to obtain a license to practice a profession, to hunt or fish, and so forth." Fn. 13, Id. citing from Shapiro v. Thompson, 394 U.S. 618, 638 at n. 21.

VI. BILL OF ATTAINDER

We find Flemming v. Nestor controlling as to this issue. In the above case, the plaintiff Ephraim Nestor a former resident of Bulgaria had been deported from the United States for membership in the Communist Party and under the applicable law, 42 U.S.C. 402 (n), was denied his Social Security benefits. He sued alleging the unconstitutionality of the said law arguing, inter alia, that it constituted a Bill of Attainder. The Court upheld the law's constitutionality and, in doing so, laid down the applicable framework for what constitutes a Bill of Attainder which we shall cite for its pertinency to this case:

> "Essential to the success of each of these contentions is the validity of characterizing as 'punishment' in the constitutional sense the termination of benefits under § 202(n) . . . Here the sanction is the mere denial of a non contractual governmental benefit. No affirmative disability or restraint is imposed. . ." Id. at 616-617 (emphasis added).

The Court went on to add that the plaintiff had to prove a "punitive design" by "only the clearest proof [which would]. . . establish the unconstitutionality of such a statute." at 617. Owing to the presumption of constitutionality with which a statute is clothed, such proof would be neutralized or negated if there were other rationally cognizable grounds which the legislature could have had in mind as the rationale of statute. Id. at 616-621. We hold for the reasons set forth, supra, that there are demonstrable and very legitimate state purposes, Trop v. Dulles, 356 U.S. 86, 96

(1957), that warrant the no-refund provision of the instant pension fund; and that, moreover, we do not think the no-refund provision, standing alone, was meant to be punitive in the first place. Its only goal as far as we can see is to save money - not to punish anybody.

VII. SUPREMACY CLAUSE

The plaintiffs allege that the operation of the instant statute as it was then applied to class plaintiffs is in conflict with the Social Security laws and is therefore in violation of the Supremacy Clause, Article VI of the United States Constitution. The plaintiffs allege that they were under a mandatory Social Security exemption while employed, 42 U.S.C. § 418, and that the "statutory provisions of 'no refund' violate the intent and provisions of exemption under the Social Security Act."[35] We simply see no conflict. The then exemption (Social Security coverage is now optional as to police and firemen, 42 U.S.C. supra at (p) (1) (pocket part) as amended October 30, 1972) was decreed by Congress and we simply fail to see how the implementation of the will of Congress conflicts with the will of Congress.

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35. Points and Authorities in Opposition to Defendents' Motion for Summary Judgment at 3.

VIII. CONCLUSION

Therefore, for the reasons set forth, supra, we will grant Defendants' Motion for Summary Judgment in all respects and deny Plaintiffs' Motion for Partial Summary Judgment as to Liability.[36]

BY THE COURT:

/s/ Thomas J. Clary
Thomas J. Clary, Senior Judge
U. S. District Court
(Sitting by Special Designation)

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36. In view of the granting of judgment in favor of the defendents it becomes unnecessary to act upon plaintiffs' outstanding interrogatories and Supplemental Interrogatories. The Answers to said Interrogatories could in no way change tne result of this case.

APPENDIX D

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

RAYMOND MUZQUIZ, MARIANO GRANADOS, ROBERT G. BROOKS, WILLIAM C. MADISON, CHARLES R. HARRELSON, KENNETH W. ESKEW, EDDIE D. HAMM, and every other person similarly situated in the same or similar class,

Plaintiffs,

vs.

CITY OF SAN ANTONIO; BOARD OF TRUSTEES, FIREMEN AND POLICEMEN'S PENSION FUND OF SAN ANTONIO and the members of said Board, individually and in their capacity as members of said Board, named herein as JOHN GATTI, WALTER W. McALLISTER, DR. HERBERT CALDERON, JOE DiSTEFANO, HENRY ANTAN, L. E. MASON and A. G. CAMPA, and JOHN DOES I through 100,

Defendants.

C.A. No.
SA-72-CA-271

FOURTH AMENDED CLASS ACTION COMPLAINT

JURISDICTION: Plaintiffs allege that jurisdiction of this Court in this action exists pursuant to Title 28 U.S.C. 1331, Title 42 U.S.C. 1983, Title 42 U.S.C. 1985, 28 U.S.C. 2201, Title 28 U.S.C. 1343, and this Court's pendant or ancillary jurisdiction.

VENUE: Plaintiffs allege that the San Antonio Division of the Western District of Texas is a proper forum for this action based upon Title 28 U.S.C. 1392, Title 28 U.S.C. 1393, in that one or more of the Defendants and Plaintiffs reside in the San Antonio Division of the Western District of Texas.

NATURE OF THE ACTION: Plaintiffs, on behalf of Class Plaintiffs, seek a single judgment to have this Court declare the Texas statute V.T.C.S. Article 6243f, and certain sections of said statute, to be in controvention of the due process clause and/or the equal protection clause, and/or just compensation clause of the Fifth and Fourteenth Amendments of the United States Constitution. Plaintiffs seek to have this Court enjoin Defendants in the enforcement of said statute, which Defendants include the members of the BOARD OF TRUSTEES, FIREMEN AND POLICEMEN'S PENSION FUND OF SAN ANTONIO and the CITY OF SAN ANTONIO, all of whom are enforcing, or seeking to enforce, said statute. Plaintiffs have no state remedy, and by the enforcement of Article 6243f, Plaintiffs are suffering irreparable injury, and their constitutional rights are being continually denied under color of State law, in violation of the provisions of Title 42 U.S. Code, 1983. There exists in this

cause a substantial federal question, pursuant to Warner v. Board of Trustees, 277 F.Supp., 736, and jurisdiction also exists under 42 U.S.C.A. 1983 and 28 U.S.C.A. 1343. Plaintiffs, on behalf of Class Plaintiffs, also seek an accounting, restitution, damages, both special and general, and/or just compensation for the taking of Class Plaintiffs' private property for public use, contrary to the provisions of the Fifth and Fourteenth Amendments to the United States Constitution.

PARTIES: Plaintiffs RAYMOND MUZQUIZ, MARIANO GRANDOS, ROBERT C. BROOKS, WILLIAM C. MADISON, CHARLES R. HARRELSON, KENNETH W. ESKEW, EDDIE E. HAMM, and all former San Antonio policemen or firemen, and all are citizens of the United States of America. The Defendants, BOARD OF TRUSTEES, FIREMEN AND POLICEMEN'S PENSION FUND OF SAN ANTONIO, is a city agency and alter ego of the CITY OF SAN ANTONIO, and the individual members of said Board, and the CITY OF SAN ANTONIO are constituted and all act for the purpose of administering, enforcing and managing the Firemen and Policemen's Pension Fund acting under State law, namely V.T.C.S. Article 6243f. Plaintiffs seek an injunction, just compensation, damages and/or refunds against the above-styled Pension Fund and/or the City of San Antonio, which is the alter ego of said Pension Fund.

FIRST CAUSE OF ACTION - EQUAL PROTECTION

I

Plaintiffs and Class Plaintiffs are all former members of the City of San Antonio Police or Fire Departments. As former San Antonio Police or Firemen, Plaintiffs and Class Plaintiffs have been compelled

by State law to contribute part of their salary by automatic deductions by their employer, the City of San Antonio, to the Firemen and Policemen's Pension Fund, after Federal Income Taxes were first deducted. All Plaintiffs and Class Plaintiffs have been separated from the San Antonio Police or Fire Department prior to the time they were entitled to receive benefits from said fund, either as a result of service-connected disability or 20-year retirement.

II

Plaintiffs and Class Plaintiffs have had deductions made from their salaries earned as San Antonio police or firemen, which deductions were converted by the City of San Antonio and deposited to the Firemen and Policemen's Pension Fund of the City of San Antonio, in accordance with V.T.C.S. Article 6243f. Said Plaintiffs and Class Plaintiffs have not received any refund whatsoever, since their separation from the Police or Fire Department of the City of San Antonio; refunds of said deductions having been denied because Texas statute prohibits refunds from being made for any reason, that is V.T.S.C. Article 6243f, Section 19.

III

Plaintiffs on behalf of Class Plaintiffs allege that it is a condition of employment and mandatory for a police officer or fireman in the City of San Antonio to contribute to the Firemen and Policemen's Pension Fund. Plaintiffs further allege that all other former firemen or policemen of the San Antonio Police or Fire Departments who have been

separated from the Departments without becoming eligible for a pension in accordance with the provisions of Article 6243f, but who have served on the San Antonio Police Department or Fire Department since the inception of said law, have had deductions made from their salaries in accordance with Article 6243f. Plaintiffs further allege that all firemen or police officers not qualified for pensions or serivce-connected disability, have been denied refunds upon their separation from the San Antonio Police or Fire Departments for the same reason that Plaintiffs have been denied a refund of their salary deductions, that is to say, under the color of State law; more particularly V.T.C.S. Article 6243f, Section 19.

IV

Plaintiffs on behalf of Class Plaintiffs allege that V.T.C.S. Article 6243f and Section 19 of Article 6243f fail to grant equal protection of law to San Antonio policemen or firemen who became separated from that employment either voluntarily or for cause. Said statute involved herein is invidiously discriminatory, arbitrary and capricious, and denies equal protection to San Antonio firemen or policemen in that (1) police officers or firemen of the Police or Fire Departments of other cities within the State of Texas are not required to suffer forfeiture of their salary deductions to their respective pension plans upon separation from their employment, and (2) all other City of San Antonio employees, except San Antonio police and firemen, are not required to forfeit their contributions upon early termination of employment, and (3) other city employees of other Texas cities and other Texas State employees are

not required to forfeit their contributions upon early termination, and (4) in other Texas cities such as Dallas or Houston, the police and/or firemen have the option to join or not to join their respective statutory Retirement Funds, while the State of Texas makes it mandatory for San Antonio police to join and contribute to the State-created City retirement fund, and (5) within the City of San Antonio, the police and firemen are forced to join the Firemen's and Policemen's Pension Fund.

V.

Further, Plaintiffs would show to this Court that the absolute unequal application of this statute is reflected in the treatment of the various Texas cities by the State of Texas. Such discrimination is so random and irrational as to be arbitrary and capricious. Such examples can be seen in Article 6243a, Section 10(d), V.T.C.S., which regulates the Firemen's Pension Fund in cities having a population of between 185,000 and 225,000. According to the preceding 1960 census, Austin is the only such city. Section 10(e) of said statute provides that a fireman who terminates his employment before being eligible for retirement will be refunded all contributions made by him to the fund.

VI.

Further, V.T.C.S. Article 6243j regulates a pension fund only for firemen in Fort Worth. Section 26 of said statute expressly provides for refunds of all contributions made to the fund by firemen who terminate their employment before becoming eligible for retirement. Further,

other Texas statutes dealing with membership in retirement funds, such as Article 6243h, Sections 7, 8, Article 6235a(1), Section 4f and Article 6243g, Section 16, make the same express provision. Therefore, Plaintiffs allege that public employees who contribute to pension funds regulated by statutes expressly providing for refunds have a vested interest.

Plaintiffs further allege that, with some pension funds, deductions are treated by the State Courts of Texas as property of the employee because he has a vested interest in them, and in other cases the Texas Courts regard other similar pension funds and contributions by public employees to those pension funds as not being a vested interest and not being property rights.

VII.

Plaintiffs submit that policemen or firemen who work for the City of San Antonio are not informed and not aware at the time of employment as policemen or firemen of the fact that they do not and are not permitted to withdraw their salary deductions upon leaving the Police or Fire Departments. That such taking of Plaintiffs' earned "vested property rights" for a public use without notice, without any hearing, and without just compensation is clearly a violation of the Fifth and Fourteenth Amendments to the United States Constitution. Such action is so invidiously discriminatory without any compelling lawful State interest or reason as to constitute a denial of Plaintiffs' federal constitutional rights to equal protection under the law.

VIII.

Further, Plaintiffs and Class Plaintiffs submit that to deny policemen and firemen refunds of their contributions, who were unfortunate enough to work for the City of San Antonio, and to permit other policemen and firemen in other cities within the State of Texas to withdraw their contributions upon termination of employment is not based upon any compelling State interest, is an arbitrary and unreasonable classification, without any rational connection to any lawful end sought to be achieved.

IX.

Plaintiffs submit that there is no lawful compelling State interest, no rational connection to lawful public interest, or no reasonable basis to justify the Texas legislature classifying large cities one way for minimum salary purposes and another way for pension fund purposes.

X.

Plaintiffs on behalf of Class Plaintiffs allege that Article 6243f is a State statute passed by the legislature of the State of Texas for the specific benefit of the City of San Antonio. The City of San Antonio, under said law and clothed with State authority, did in fact adopt such a pension fund pursuant to said statute. Plaintiffs' and Class Plaintiffs' claims and demands in this cause are primarily against the BOARD OF TRUSTEES, FIREMEN

AND POLICEMEN'S PENSION FUND OF SAN ANTONIO, and the CITY OF SAN ANTONIO, in that the firemen or police officers pension fund of said City operates for the benefit of and under the direction of the City of San Antonio and deductions from Plaintiffs' salaries have been made by the City of San Antonio.

SECOND CAUSE OF ACTION - DUE PROCESS

Plaintiffs and Class Plaintiffs allege and re-allege and incorporate by reference all allegations set forth in Plaintiffs' First Cause of Action, Paragraphs I through X , as if fully stated herein, and in addition thereto further allege:

XI.

Plaintiffs and Class Plaintiffs allege that the Defendants CITY OF SAN ANTONIO and the BOARD OF TRUSTEES, FIREMEN AND POLICEMEN'S PENSION FUND OF SAN ANTONIO have, upon earlier termination of employment by Plaintiffs, unconstitutionally taken Plaintiffs' and Class Plaintiffs' own vested property rights to monies they have earned, after having paid Federal Income Taxes on said monies, and after having paid for a period of time Federal Withholding Taxes. Such taking by the Defendant CITY OF SAN ANTONIO of Plaintiffs' money without any prior hearing, without any notice, without any judicial proceeding, contravenes the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution.

THIRD CAUSE OF ACTION - BILL OF ATTAINDER

Plaintiffs and Class Plaintiffs allege and re-allege and incorporate by reference all allegations set forth in Plaintiffs' First and Second Causes of Action, Paragraphs I through XI, as if fully stated herein, and in addition thereto, further allege:

XII.

Plaintiffs and Class Plaintiffs allege that, upon early termination of employment with the Defendant CITY OF SAN ANTONIO, prior to retirement or a service-connected disability, Plaintiffs are compelled under color of State law to forfeit their own contributions as legislative punishment for their termination. That such legislatively-imposed summary punishment without a judicial hearing constitutes a Bill of Attainder in violation of Article I, Section 10 of the United States Constitution.

FOURTH CAUSE OF ACTION - INVERSE CONDEMNATION

Plaintiffs and Class Plaintiffs allege and re-allege and incorporate by reference all allegations set forth in Plaintiffs' First, Second, and Third Causes of Action, Paragraphs I through XII, as if fully stated herein, and in addition Plaintiffs further allege:

XIII.

Plaintiffs and Class Plaintiffs submit that the taking of Plaintiffs' vested property rights by the Defendant CITY OF SAN ANTONIO and by the Defendant BOARD OF TRUSTEES, FIREMEN AND POLICEMEN'S PENSION FUND OF SAN ANTONIO to pay greater amounts of money to the few retiring police and fire captains and police and fire chiefs for their service to the public, constitutes a taking or inverse condemnation of Plaintiffs' property for a public use without just compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution.

FIFTH CAUSE OF ACTION - SUPREMACY CLAUSE

Plaintiffs and Class Plaintiffs allege and re-allege and incorporate by reference all allegations set forth in Plaintiffs' First, Second, Third and Fourth Causes of Action, Paragraphs I through XIII, as if fully stated herein, and in addition thereto further allege:

XIV.

The Plaintiffs, while employed by the City of San Antonio, were under a Federal Social Security exemption, and therefore, were not covered by the Federal Social Security laws: that the Defendants' refusal to refund Plaintiffs' contributions effectively denied Plaintiffs the opportunity to take their contributions and invest in some other retirement or protection plan or to be covered by the Federal Social Security plan; that during these years of service with the City of San

Antonio, Plaintiffs and their dependents have acquired no protection against total disability and old age; that the statutory provisions of "no refund" violate the intent and provisions of the exemption under the Federal Social Security Act, thereby violating the Supremacy Clause of the U.S. Constitution.

XV.

Constructive Trust.

Plaintiffs on behalf of Class Plaintiffs allege that, if this Court determines V.T.C.S. Article 6243 and/or V.T.C.S. Article 6243f, Section 19, to be in violation of the United States Constitution, then Plaintiffs, on behalf of Class Plaintiffs, request this Court to place a constructive trust on the amount of money in the Defendant FIREMEN AND POLICEMEN'S PENSION FUND OF SAN ANTONIO, which belongs to Plaintiffs and Class Plaintiffs, equal to the present value of all the money withheld by the Defendants.

XVI.

Restitution.

The Defendant BOARD OF TRUSTEES, FIREMEN AND POLICEMEN'S PENSION FUND OF SAN ANTONIO, has the power to invest funds in its care, custody and control from time to time as it sees fit. Plaintiffs allege on information and belief that the Defendants have invested some or all of Plaintiffs' and Class Plaintiffs' funds in their care, custody and control, and that the Defendants have earned money from these investments.

That some of the Plaintiffs and Class Plaintiffs herein have attempted to learn the total amount deducted from their salaries in accordance with the law, but have been unable to obtain this information from the Defendant Pension Fund of the City of San Antonio.

Plaintiffs allege that all monies contributed by the Plaintiffs and Class Plaintiffs to the Defendants have been contributed under duress, under mistake of fact, or mistake of law. If this Court finds that the statute complained of herein is unconstitutional, Plaintiffs request this Court for a mandatory injunction compelling the Defendants to give an accounting of all the Plaintiffs' and Class Plaintiffs' contributions plus the value of the money earned by the Defendants on said funds and/or alternatively a reasonable rate of interest, and/or for just compensation to Plaintiffs for the unconstitutional taking, plus attorney's fees and costs.

XVII.

Single Class Judgment.

Plaintiffs request a single liquid fund judgment on behalf of the entire class for the present value or sum of all money contributed by the entire class of former policemen and firemen plus the present value or sum of the money wrongfully earned by the Defendants on these funds belonging to Class Plaintiffs, described herein, plus costs and attorney's fees, and any other relief at law or in equity either special or general this Court deems just.

Class Action - Firemen and Policemen

In accordance with the Federal Rules of Civil Procedure, Rule 23, these Plaintiffs bring this action on behalf of all other former San Antonio policemen and firemen and fire alarm operators who have been separated from the San Antonio Police or Fire Department, voluntarily or involuntarily, prior to becoming eligible for a pension and who contributed to the retirement fund operated by the Defendants, CITY OF SAN ANTONIO and the BOARD OF TRUSTEES, FIREMEN AND POLICEMEN'S PENSION FUND OF THE CITY OF SAN ANTONIO. Further, Plaintiffs believe and allege this is a proper case for a class action because the claims of the entire class are common and undivided.

Further, in accordance with the Federal Rules of Civil Procedure, Rule 23, Plaintiffs also bring this action on behalf of the widows and heirs or legal representatives of all deceased former members of the San Antonio Police and Fire Departments who were separated from the police or fire department prior to becoming eligible for retirement, but who contributed to the Defendant Pension Fund of the City of San Antonio in accordance with Article 6243f, and who were denied a refund of their salary deductions in accordance with Section 19 of Article 6243f.

In accordance with the provisions of Rule 23 of the Federal Rules of Civil Procedure, this action is being brought on behalf of all others similarily situated for the reason that there are exact common questions of law and/or fact; a common relief is sought; and the

persons similarly situated and affected by the matters here involved are so numerous as to make it impractical to bring them all before the Court.

That the claims or defenses of the representative parties are typical of the claims or defenses of the class, that the representative parties will fairly and adequately protect the interests of the class that the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; and the parties opposing the class have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the entire class as a whole and/or that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Plaintiffs unite in this action to enforce a single right in which they have a common and undivided interest; and Plaintiffs seek recovery primarily for the entire class in that the amount or value in controversy in this action is the aggregate of the present value of all money withheld by Defendants from all former police or firemen and fire alarm

operators of the City of San Antonio. Plaintiffs seek a single judgment for the entire class or classes.

Plaintiffs further allege that this is a proper case for a class action under Rule 23 of the Federal Rules of Civil Procedure in that this is a Rule 23(b)(1)(A) class action, alternatively a Rule 23(b)(1)(B) class action, alternatively a Rule 23(b)(2) class action, alternatively a Rule 23(b)(3) class action, alternatively a Rule 23(a)(b)(3) class action and that Plaintiffs request this Court to order this litigated as a class action, pursuant to Rule 23.

Damages, Accounting
and/or Just Compensation

Plaintiffs on behalf of Class Plaintiffs allege herein that:

A. One or more of the Plaintiffs above-styled have an amount in controversy in excess of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs.

B. All of the Plaintiffs above-styled in this Complaint individually have a value in controversy in excess of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs.

C. The Plaintiffs have united in this action to enforce a single right in which they have a common and undivided interest, and Plaintiffs seek recovery primarily for the

entire class, and that the amount and/or value in controversy is the aggregate of the present value or sum of the money withheld by the Defendants, plus the present value of the money actually earned on the money wrongfully withheld by the Defendants, or in the alternative, just compensation for taking of Plaintiffs' and Class Plaintiffs' private property for public use.

D. The value in controversy is also the value to the Plaintiffs of the right to be free from the effect of enforcement of Section 19 of Article 6243f of V.T.C.S. Therefore, the Plaintiffs and Class Plaintiffs allege herein that the injunctive relief sought herein places the value in controversy, to the Plaintiffs and Class Plaintiffs of the right to be free from this burden, in excess of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs. If such burden is not removed, each Plaintiff and Class Plaintiff will be injured in excess of Ten Thousand Dollars ($10,000.00), because the Defendants will continue to wrongfully earn money on the Plaintiffs' and Class Plaintiffs' contributions and convert said contributions and earnings wrongfully. Since the Plaintiffs have asked this Court to impose a constructive trust on said earnings, income and profits and emoluments for benefit of Plaintiffs, such amount exceeds

the jurisdictional amount.

E. Some of the Plaintiffs have involuntarily on deposit with the Defendant Pension Fund of the City of San Antonio money which was converted by the City of San Antonio to said funds in the 1930's and 1940's, when the value of the dollar was at or near 100 cents on the dollar. It is fundamentally unfair to base the refund or jurisdiction of the Court on the dollar for dollar concept. That Plaintiffs' and Class Plaintiffs' amount or value in controversy as well as the amount due to be refunded to Class Plaintiffs should be the value of the money withheld wrongfully by the Defendants plus the value or amount of money actually earned by the Defendants on the money wrongfully withheld. It would therefore, be unjust to force the Plaintiffs to contribute dollars which in the 1930's and early 1940's were worth 100 cents and now to repay Plaintiffs with nineteen (19) cent dollars. That Plaintiffs are entitled to be made whole and just compensation would make Plaintiffs whole.

WHEREFORE, Plaintiffs, on behalf of themselves and on behalf of Class Plaintiffs pray that this Court award Plaintiffs and Class Plaintiffs a Judgment against the Board of Trustees, Firemen and Policemen's Pension Fund of San Antonio and the City of San Antonio jointly and/or severally for an amount of money in excess of $10,000.00, exclusively of interest and

costs, the exact amount of which is currently unknown to Plaintiffs, for an accounting, and for an amount according to proof including a Declaratory Judgment declaring V.T.C.S. Article 6243f and/or Section 19 of Article 6243f to be in violation of the U.S. Constitution; for an injunction enjoining the Defendants from enforcing said statute, plus costs, reasonable interest and attorney's fees. That the special damage or injury to Plaintiffs for which Plaintiffs pray judgment for just compensation of this Court are as follows:

1. First Cause of Action - for relief as set forth in Plaintiffs' Complaint on pages 13, 14 and 15;

2. Second Cause of Action - for relief as set forth in Plaintiffs' Complaint on pages 13, 14 and 15:

3. Third Cause of Action - for relief as set forth in Plaintiffs' Complaint on pages 13, 14 and 15;

4. Fourth Cause of Action - for relief as set forth in Plaintiffs' Complaint on pages 13, 14 and 15;

5. Fifth Cause of Action - for relief as set forth in Plaintiffs' Complaint on pages 13, 14 and 15;

6. For such other and further relief as to the Court seems proper in the premises.

/s/ Kermitt L. Waters, Esq.
KERMITT L. WATERS, ESQ.
316 Bridger Avenue
Las Vegas, Nevada 89101

Attorney for Plaintiffs.

APPENDIX E

Raymond MUZQUIZ et al.,
Plaintiffs-Appellants,

v.

CITY OF SAN ANTONIO et al.,
Defendants-Appellees.

No. 74-3177

United States Court of Appeals,
Fifth Circuit.

Oct. 8. 1975.

Former San Antonio policemen and firemen challenged the operation of the city's firemen's and policemen's pension fund, and sought refund of amounts they had contributed while they were serving. The United States District Court for the Western District of Texas at San Antonio, Thomas J. Clary, J., sitting by designation, granted defendants' motion for summary judgment and held the no-refund statutory provisions constitutional. The plaintiffs appealed. The Court of Appeals, Tuttle, Circuit Judge, held that where the firemen and policemen received protection in event of death or disability far in excess of their contributions, and protection continued so long as they remained employed as firemen and policemen, there was no taking of their property without compensation by reason of nonrefundability of the contributions. The differences in legislative treatment as between San Antonio and other cities and as between the plaintiffs and other

types of municipal employees were reasonable and not violative of equal protection.

Affirmed.

Godbold, Circuit Judge, filed an opinion dissenting in part.

1. Civil Rights
Test of whether municipal police and firemen's pension fund board of trustees was not a "person" as used in 1871 civil rights statute was whether board had such duties, powers and purposes as would make it of "the nature of a municipality." 42 U.S.C.A. § 1983.
See publication Words and Phrases for other judicial constructions and definitions.

2. Courts
Determination whether pension fund board of trustees was "person" within 1871 civil rights statute was question of federal law, but court was required to look to state law to determine powers and duties and purpose of the board. 42 U.S.C.A. § 1983.

3. Civil Rights
Firemen's and policemen's pension fund board of trustees was "person" within 1871 civil rights statue, rather than entity in nature of municipality, where board was not responsible for any broad governmental function and board members were statutory trustees responsible only to beneficiairies. Vernon's Ann.Tex.Civ.St. arts. 6243f, 6243f, § 21; 42 U.S.C.A. § 1983.

4. Civil Rights
Individual members of firemen's and policemen's pension fund board of trustees were subject to suit under 1871 civil rights statute. 42 U.S.C.A. § 1983; Vernon's Ann.Tex.Civ.St. art. 6243f.

5. Civil Rights
Whether municipal officers and employees are within term "person" in 1871 civil rights statute is not dependent upon nature of relief sought. 42 U.S.C.A. § 1983.

6. Courts
States
No consideration of sovereign immunity of Eleventh Amendment immunity from suit should be imported into court's consideration as to whether 1871 civil rights statute permits or denies plaintiff power to sue particular minor governmental agency or official. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amend. 11.

7. Eminent Domain
Where firemen and policemen received protection in event of death or disability far in excess of their contributions to pension fund and protection continued so long as they remained employed as firemen and policemen, there was no taking of their property without compensation by reason of nonrefundability of moneys deducted from their pay for the contributions. U.S.C.A.Const. Amend. 14; Vernon's Ann.Tex.Civ.St. art. 6243f.

8. Constitutional Law
As a class, firemen and policemen in San Antonio could not be considered a "suspect class," thus requiring strict scruting of legislative purposes for differences in treatment in pension legislation. Vernon's Ann.Tex.Civ.St. art. 6243f; U.S.C.A.Const. Amend. 14.

9. Constitutional Law
Interest plaintiffs sought to assert with respect to their contributions to firemen's and policemen's pension fund was not fundamental personal right which would require strict scrutiny of legislative purposes for difference in treatment in pension legislation. Vernon's Ann. Tex.Civ.St. art. 6243f; U.S.C.A.Const. Amend. 14.

10. Constitutional Law
Absent suspect classification or infringement on some fundamental right, classification is deemed constitutionally permissible if it is found to have "reasonable relationship" to legitimate governmental interest. U.S.C.A.Const. Amend. 14.

11. Federal Civil Procedure
Plaintiff's interrogatory as to legislative purpose called for legal rather than factual conclusion, and closure of discovery before defendants answered interrogatories as to purpose for statutory provisions was not improper. Vernon's Ann.Tex.Civ.St. art. 6243f.

12. Constitutional Law
Municipal Corporations
Difference in legislative treatment

of pension system for San Antonio policemen and firemen, as between San Antonio and other cities and as between plaintiff policemen and firemen and other types of municipal employees were reasonable and there was no violation of equal protection. Vernon's Ann.Tex.Civ. St. arts. 6243f, 6243j; U.S.C.A.Const. Amend. 14.

13. Constitutional Law
Municipal Corporations
Statutory provision under which city firemen and policemen leaving public employment before becoming eligible for pension benefits were not entitled to refund of contributions did not violate constitutional right to travel nor constitute bill of attainder. Vernon's Ann. Tex.Civ.St. art. 6243f; U.S.C.A.Const. Amend. 14.

14. Constitutional Law
"Bill of attainder" is legislative act inflicting penalty without judicial trial.

Appeal from the United States District Court for the Western District of Texas.

Before TUTTLE, GODBOLD and MORGAN, Circuit Judges:

TUTTLE, Circuit Judge:

Plaintiffs are former San Antonio policemen and firemen who challenge the

operation of the city's Firemen's and Policemen's Pension Fund. The remaining defendants are the Pension Fund Board of Trustees and its members as individual party defendants. Pursuant to Article 6243f of Vernon's Texas Civil Statutes the city of San Antonio maintains a pension fund to which all policemen and firemen are obliged to contribute a portion of their salaries. The pension fund provides death and disability benefits for officers injured in the line of duty, and provides retirement benefits. Should an officer leave public employment before he is eligible for any of these benefits, however, the Act specifically provides:

> "[N]o member of either of said Departments or of said Fund shall ever be entitled to any refund from said Fund on account of the money deducted from that ammount of their pay . . . which money is in itsely declared to be public money, and the property of said Fund for the benefit of the members qualifying for benefits, and their beneficiaries."

Article 6243f, § 19. The plaintiffs filed this class action seeking a refund of the amounts they contributed

while they were serving as policemen or firemen in San Antonio.[1]

The district court granted defendants' motion for summary judgment, holding that the no-refund provisions of Article 6243f were constitutional. The plaintiffs appeal.

I. JURISDICTION

The plaintiffs primarily assert jurisdiction under 42 U.S.C. § 1983, and its jurisdictional counterpart 28 U.S.C. § 1343.[2] Section 1983 provides:

> "Every person who, under color of any statute . . . of any State, . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights . . . secured by the

1. This suit was originally filed as a class action purporting to represent a class of all former policemen and firemen of Houston, Dallas, El Paso and San Antonio; the action was severed into four separate class actions. Walker v. City of Houston. 341 F.Supp. 1124 (S.D.Tex. 1971) and each action was held to be properly considered by a single district judge. 341 F.Supp. 1117 (S.D.Tex.1971).

2. The plaintiffs also asserted jurisdiction under 28 U.S.C. § 1331. The Stipulations of the parties make it clear, however, that no class member's claim amounts to the $10,000.needed under § 1331.

> Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceedings for redress."

The Supreme Court has held that the term "person" as it is used in § 1983 does not include municipal corporations, Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); City of Kenosha v. Bruno, 412 U.S. 507, 93 S. Ct. 2222, 37 L.Ed.2d 109 (1973). Relying on Kenosha the district court dismissed the City of San Antonio as a party, but found that jurisdiction would lie against the Pension Fund and its individual board members.

Although the issue is not raised by the briefs of either party, the correctness of the trial court's determination that the Pension Fund Board of Trustees and its individual members are subject to suit under 42 U.S.C. § 1983, was raised by the parties at oral argument. In any event, since the question touches on the court's jurisdiction, we consider that it should be disposed of.

The Pension Fund Board of Trustees and the named individuals comprising the Board contend, in a word, that they are immune from suit under § 1983 because they are not "persons", since they are performing governmental functions and that the reasoning by which the Supreme Court in Monroe, supra, arrived at the decision that the term "every person" in § 1983 did not comprehend a city, and, later, in Moor v. County of Alameda, did not comprehend a county, requires that actual designated persons

acting as trustees of a governmental agency also be held not to be comprehended within the word "person" in this statute.

Neither the Supreme Court nor this Court has thus far limited the scope of § 1983. The most comprehensive discussion of the extension of the Monroe and later Kenosha principle in this Circuit is in Adkins v. Duval County School Board, 511 F.2d 690 (5th Cir., 1975). In that case a plaintiff sued Duval County School Board in its corporate capacity. The opinion stated, as to the issue relevant to the question now before us:

> "Two things should be noted to the argument concerning the far-reaching effect of the district court's decision. First, the issue is not whether the school board can be sued. Personal jurisdiction of the defendants is not questioned. We are confronted only with subject matter jurisdiction, i. e., whether a cause of action against a school board recognizable in federal courts was created by § 1983. Second, our responsibility is not to decide whether Congress could or should establish such a cause of action, or whether a similar cause of action may exist under some other jurisprudence, but whether Congress in fact did direct a § 1983 cause of action against school boards. Unlike constitutional decisions, our determination here can be corrected by Congress itself if it desires another result.

We can find no controlling distinction between a Florida school board, as a governmental entity, and a Florida municipality or a Florida county, that would suggest that Congress would include one within the purview of the statute, and not the other two. All three find authority for their existence in the Florida Constitution. See F.S. A.Const. Art. VIII, §§ 1 and 2 and Art. IX, § 4. Counties, municipalities and school districts are granted the power in the Constitution to participate in establishing taxes and tax rates for their respective purposes, F.S.A. Const. Art. VII, § 9, which power is exercised by their respective governing bodies. See F.S.A. § 200.011. The legislature has provided each with significant governmental power with which to operate for its respective purposes. See F.S.A. § 125.001 et seq. (counties); F.S.A. § 165.01 et seq. (municipalities); F.S.A. § 230. 01 et seq. (school districts).

In an exercise of legislative discretion the Florida legislature has chosen to designate the school board as a 'body corporate' for all purposes, including institution and defense of suits involving official action. See F.S.A. § 230.21. It has similarly chosen to have the governing authority of a municipality or county generally operate in the name of the county or municipality, including suing and being sued as a 'body corporate'. See F.S.A. §§ 125. 15 , 165.08. Each of these gover-

nmental entities, a school district, a county and a municipality, can operate as an entity only through its designated governing authority, the school board, the county commissioners, and the city council. The fact that the Florida legislature has designated the governmental entity to be sued in its own name in two instances and in the name of the governing authority in the third does not change the character of the suit. The suit, however styled, is against the governmental subdivision itself in each case.

We have recently held that the various arms of state government, such as the Department of Highways, are not 'persons' within the meaning of § 1983, Chermanie v. Tucker, 493 F.2d 586, 587-588 (5th Cir.), cert. denied, 419 U.S. 868, 95 S.Ct. 126, 42 L.Ed.2d 107 (1974). That decision would seem to follow logically from Monroe, Moor, and Kenosha. All of those precedents dealt specifically with political subdivisions of a state, i. e., municipalities and counties. If the subdivisions of a state were not 'persons' under § 1983, the state itself was obviously not such a 'person' and therefore, the entities through which the state functions should be excluded. An analysis of the approach taken by the Supreme Court in Kenosha and Monroe, and that Court's expression of what it views the legislative intent to have been when Congress passed the Civil Rights Act of 1871, seems to require the

conclusion that § 1983 was similarly not directed at county school boards."

In the Adkins case, the opinion also said: "We have recently decided that a Texas school district which 'under Texas law, is in the nature of a municipality' (emphasis added) is not a 'person' as that term is used in § 1983. Sterzing v. Fort Bend Independent School District, 496 F.2d 92, 93 n.2 (5th Cir. 1974)".

[1] It is, thus, apparent that our inquiry here is whether the San Antonio Police and Firemen's Pension Fund Board of Trustees has such duties, powers, and purposes as would make it of "the nature of a municipality". If so, then the Board of Trustees cannot be sued under § 1983. If not, then it can.[3]

[2,3] While the determination whether the Police and Firemen's Pension Fund Board of Trustees is a "person" within the meaning of § 1983, is a question of federal law, See Monroe v. Pape, supra, 365 U.S. at 187-192, 81 S. Ct. 473, the Court must look to the state law to determine the powers and duties and purpose of the entity created. The purposes of this fund are set out above. The City of San Antonio, pursuant to

3. We are here dealing,,of course, with the Board of Trustees itself, and not with the individuals who are also named in their individual capacities, with respect to which question we deal later in the opinion.

Art. 6243f of Vernon's Civil Statutes maintains a pension fund to which all policemen and firemen are obliged to contribute a portion of their salaries. The named defendents are the trustees of this fund. The Board possesses none of the broad governmental powers which we held to be controlling in Adkins v. Duval County School Board. It is not responsible for any broad governmental function, thereby serving the public interest. As statutory trustees, the Board members are responsible only to the beneficiaries of the trust. In sum, while § 21 of Art. 6243f provides that the City of San Antonio is obliged to pay any deficiencies between the money procured under the Act and benefits paid, nonetheless, the Board of Trustees functions as a group of statutory trustees rather than as a governmental body; it partakes of no uniquely governmental responsibilities: it only administers the trust fund. Although not binding on this Court, we think the decision of the Texas Court of Civil Appeals in Bolen v. Board of Firemen, Policemen & Fire Alarm Operators' Trustees of San Antonio, Texas, 308 S.W. 2d 904, 905, most clearly states the nature of this Board:

> "The Board is not the State, nor is it a county, a city, a town or any other political corporation of subdivision of the State. The Board is simply a group of statutory trustees charged with the management of the Pension Funds of the Firemen, Policemen and Fire Alarm Operators of the City of San Antonio."

The Court further said in the Bolen case:

> "The Board just simply is not a political corporation nor a political subdivision of the State. It does not have any of the attributes of a political subdivision. A political subdivision contemplates: geographical area and boundaries, public elections, public officials, taxing power and a general public purpose or benefit. The board has none of these attributes . . ."

What seems to be the view of the Texas Court is that pension funds serve an essentially private function. They differ from independent pension funds as set up by other employers or labor unions only in that the beneficiaries are public employees. Such funds could just as well have been set up with the city and employees contributing to a bank or insurance company as trustee, and in that case the identical function would be performed without utilizing public officials as trustees. With this analysis we agree, and conclude that this Board of Trustees is not "like a municipality" and is thus not immune from suit as a "person" under § 1983.

[4] Further, we believe the individual members of the Board are subject to suit under § 1983. There can be no serious question but that they are "persons"; the word has never been suggested to have some arcane meaning whereby some human beings would be "persons" but others would not. Nothing

in either Monroe v. Pape or Bruno v. City of Kenosha suggests that some special meaning should be applied to the term as it is used in § 1983. Indeed, in both Monroe v. Pape and Bruno v. City of Kenosha the Supreme Court carefully noted that the jurisdictional immunity enjoyed by the two municipalities in the cases was not shared by the individual party defendants.

In Monroe v. Pape the Supreme Court reversed a decision of the Court of Appeals for the Seventh Circuit which had dismissed an action for damages against police officers of the City of Chicago. In affirming the dismissal against the city upon the well-known grounds that the work "person" in § 1983 was to be construed as not including a municipality, the Court said: "Accordingly we hold that the motion to dismiss the complaint against the City of Chicago was properly granted. But since the complaint should not have been dismissed against the officials the judgment must be and is reversed." In Bruno v. City of Kenosha, a case in which the suit had been filed only against the two cities of Kenosha and Racine, Wisconsin, seeking an injunction, the Supreme Court noted that the Attorney General of the state had intervened as a defendant and remanded the case with respect both to that posture of the case and for further consideration in light of the allegations of the complaint that the suit was based on federal question jurisdiction as well as on § 1983. It was thus clear that the Court was recognizing the right of the

plaintiff to maintain his action against the attorney general under § 1983 and against the two cities involved if he established the jurisdictional amount required for federal question jurisdiction under § 1331.

[5] This Court has specifically held that § 1983 actions can proceed against individual party defendants, despite the fact that the ultimate judgment would "surely be felt by the City." United Farmworkers for Florida Housing Project, Inc. v. City of Del Ray Beach, Florida, 493 F. 2d 92, 93, n.2 (5th Cir. 1972). In Adkins v. Duval County School Board, a case seeking reinstatement, back pay and other relief, we stated:

> "In all of the cases before us none of the individual members of the three school boards and no officials of the boards were defendants when the cases were dismissed. Had there been individual party defendants, whom this Court has previously held to be 'persons' for the purposes of 42 U.S.C. § 1983, the trial court could not, of course, have dismissed the suits for failure to allege a proper jurisdictional basis."

511 F.2d at 696. We agree with the court in Harper v. Kloster, 486 F. 2d 1134, 1138 (4th Cir. 1973) when it stated:

> "In Monroe, nevertheless, the Court held that § 1983 applied to municipal officers and employees when damages

were sought. . . We see no reason to give Kenosha any wider application."

In our view, the fact that both Sterzing and United Farmworkers of Florida Housing Project, supra, involved claims principally for injunctive relief is an irrelevant distinction. In City of Kenosha the Supreme Court specifically rejected the idea that the nature of the relief sought can affect jurisdiction.

> "We find nothing in the legislative history discussed in Monroe, or in the language actually used by Congress to suggest that the generic work 'person' in § 1983 was intended to have a bifurcated application on municipal corporations depending on the nature of the relief sought against them."

412 U.S. at 513, 93 S.Ct. at 2226. In our view, this forecloses the argument that our earlier cases can be limited solely to cases where injunctive relief is sought against municipal city officers.

The argument that the Supreme Court's construction of the work "person" in § 1983 has created a bulwark against any action which might result in making inroads on a city's financial structure is completely answered, it seems to us, by the fact the Court seemed not the least concerned about whether substantial damages against the police officers of the City of Chicago would be paid only

out of the pockets of the individual officers or out of appropriations made by the city government, or by their insurers. Moreover, nothing could more clearly demonstrate the fact that the Supreme Court intended merely to construe the language of § 1983 as not comprehending a municipality rather than granting any sort of blanket immunity to a city or a county by its Monroe decision, than the Court's treatment of the parties in Moor v. County of Alameda, supra. In that case the Court held that the County of Alameda was like a municipality and thus not comprehended within § 1983, and that the plaintiff could not sue it under that section; however, in the same opinion, the Court held that the plaintiff, being a non-resident of the State of California, adequately alleged diversity jurisdiction and that the County of Alameda was a citizen of the State of California for diversity purposes, and could be sued.

Some confusion seems to have arisen in courts which have not been frequently concerned with interpretation of the Civil Rights Acts to the extent that they seem to have assumed that since the Supreme Court--in Monroe--held that a city could not be sued under § 1983, it could not be sued at all in a federal district court. Moor v. County of Alameda clearly puts that matter to rest. Moreover, a clear answer to those who contend that Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed. 2d 662 (1974) gives instruction to the effect that the Monroe holding should be expanded to cover municipalities and other

governmental entities on some theory of sovereign immunity or protection under the Eleventh Amendment, is some of the language in Edelman, itself. In footnote 12 on Page 667, 94 S.Ct. on page 1358, the Court said:

> ". . . As may be seen from Griffin's [Griffin v. School Bd., 377 U.S. 218, 84 S.Ct. 1226, 12 L. Ed. 2d 256] citation of Lincoln County v. Luning, 133 U.S. 529, 10 S.Ct. 363, 33 L.Ed. 766 (1890), a county does not occupy the same position as a State for purposes of the Eleventh Amendment. See also Moor v. County of Alameda, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973). The fact that the county policies executed by the county officials in Griffin were subject to the commands of the Fourteenth Amendment, but the county was not able to invoke the protection of the Eleventh Amendment, is no more that a recognition of the long-established rule that while county action is generally state action for purposes of the Fourteenth Amendment, a county defendant is not necessarily a state defendant for purposes of the Eleventh Amendment."

In Lincoln County v. Luning, supra, the case referred to in the footnote quoted above, the Supreme Court said:

> "With regard to the first objection, it may be observed that the records of this court for the last 30 years are full of suits against counties; and it would seem as though

> by general consent the jurisdiction of the federal courts in such suits has become established. But irrespective of this general acquiescence, the jurisdiction of the circuit courts is beyond question. The Eleventh Amendment limits the jurisdiction only as to suits against a state. It was said by Chief Justice Marshall, in Osborn v. [The] Bank[of the United States], 9 Wheat. 738, 857 [6L.Ed. 204] that'the eleventh amendment, which restrains the jurisdiction granted by the constitution over suits against states, is of necessity limited to those suits in which the state is a party on the record.' While that statement was held by this Court in the case of In Re Ayers, 123 U.S. 443, 8 S.Ct. 164 [31 L.Ed. 216], to be too narrow, yet be that decision the jurisdiction was limited only in respect to those cases in which the state is a real, not nominal, defendant; and while the county is territorially a part of the state, yet politically it is also a corporation created by and with such powers as are given to it by the state. In this respect it is a part of the state only in that remote sense in which any city, town, or other municipal corporation may be said to be a part of the state. Metropolitan Railroad Company v. District of Columbia, 132 U.S. 1, 10 S.Ct. 19, 33 L.Ed. 231."

[6] The other case cited by Mr. Justice Rehnquist, writing for the Supreme

Court in the above footnote, Moor v. County of Alameda, has already been commented on above. It would seem clear, therefore, that none of the considerations of sovereign immunity or Eleventh Amendment immunity from suit should be imported into a court's consideration as to whether this one section of the civil rights acts is to be construed as permitting or denying a plaintiff to sue a particular minor governmental agency or official.

II. CONSTITUTIONAL CLAIMS

The plaintiffs raise a myriad of constitutional challenges to the no-refund provisions of Art. 6243f V.T.C.S. In our view, none of them has merit, and we accordingly affirm the district court's grant of summary judgment.

[7] The plaintiffs claim first that the refusal of the Pension Fund Board to refund their contributions constitutes a taking of their property without compensation, in violation of the Fourteenth Amendment. While earlier cases have termed the benefits due from such a governmental pension fund a "bounty" or a "privilege," and accordingly refused to order payment on the grounds the sovereign could withhold its gratuities

at will,[4] we do not rely on this distinction between privileges and vested rights. Rather, in our view, there was no "taking" which would require compensation. While the plaintiffs contributed to the Pension Fund, they in turn received protection in the event of death or disability far in excess of their contributions. This protection continued so long as they remained employed as firemen or policemen. They thus enjoyed the benefits of their contributions during their term of employment, and no other compensation is due them.

Similarly their argument that they are entitled to notice and hearing before they can be deprived of property fails.

[8-10] The plaintiffs also argue that they were denied equal protection inasmuch as other civil servants in San Antonio were not obliged to participate in the same pension program, and further that police and firemen in small Texas

4. See, e.g., Pennie v. Reis, 132 U.S. 464, 10 S.Ct. 149, 33 L.Ed. 426 (1889); In Re Goodwin, 57 F.2d 31 (6th Cir. 1932); MacLeod v. Fernandez, 101 F.2d 20 (1st Cir. 1983); Morgan v. United States, 115 F.2d 426 (5th Cir. 1941); Rafferty V. United States, 210 F.2d 934 (3d Cir. 1954); Anderson v. United States, 205 F.2d 326(9th Cir. 1953); Stouper v. Jones, 109 U.S. App. D.C. 106, 284 F.2d 240 (1960).

cities are not similarly affected by Art. 6243f. While it is true that the plaintiffs were treated differently from certain other public employees, it does not seem to us that this difference in treatment was in any way irrational or a violation of equal protection. Certainly as a class, policemen and firemen in San Antonio cannot be considered as a "suspect class," thus requiring strict scrutiny of the legislative purposes for the difference in treatment.[5] Nor could the interest the plaintiffs assert in their contributions to the Pension Fund be though of as some fundamental personal right.[6] Absent a suspect classification, or an infringement on some fundamental right, a classification is deemed permissible if it is found to have a "reasonable relationship" to a legitimate governmental interest.

"State legislatures are presumed

5. The district court properly dismissed such an argument as "absurd." See generally Developments in the Law--Equal Protection, 82 Harv.L.Rev. 1065, 1124-27 (1969).

6. Among such fundamental rights are: voting. Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995. 31 L.Ed.2d 274 (1972); travel. Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322. 22 L.Ed.2d 600 (1969); privacy, Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); and, of course, speech. Mills v. Alabama, 384 U.S. 214, 86 S.Ct. 1484, 16 L.Ed.2d 484 (1966).

to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts may be conceived to justify it."

McGowan v. Maryland, 366 U.S. 420, 425-26, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961).

[11, 12] San Antonio policemen and firemen particpate in a different pension program than other city employees; they are eligible for substantially greater benefits in the event of death or disability. Other city employees contribute less of their salary, are eligible for refunds, participate in Social Security, and enjoy far fewer benefits. Given the nature of the work of policemen and firemen, this difference in treatment seems eminently reasonable. The Texas Supreme Court has previously construed the pension provisions of 6243f, finding the special treatment of firemen and policemen to be based on the hazardous quality of their work. Firemen's and Policemen's Civil Service Commission v. Wells, 157 Tex. 644, 306 S.W.2d 895, 897 (1957). We find the state supreme court's construction of the legislative purpose for the statute convincing.

Similarly the difference in treatment between the policemen and firemen

in larger cities from those in smaller cities[7] can be justified on the basis of the legislature's perception of the differing hazards of the work.

Policemen and firemen in larger cities contribute a more substantial portion of their earnings, and are eligible for far greater benefits. The defendants reasonably argue that the no-refund provisions enable the state to maintain the level of benefits, thereby attracting and retaining qualified officers. While the plaintiffs appear to have conceded the fiscal rationality of the pension statutory scheme, they argue Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970) held that a state's protection of its fiscal affairs cannot be used to justify such a statute. The district court properly found Dandridge inapplicable, as it involved fundamental rights with the resultant requirement that a state demonstrate a compelling interest

7. Art. 6243j does not contain the same no-refund provisions, but applies to cities of population between 150,000 and 400,000.

in its statutory scheme.[8]

[13, 14] Finally the plaintiffs argue the no-refund provisions of Art. 6243f affected their constitutionally guaranteed right to travel and also constitute a bill of attainder. Neither argument has any substance. Certainly the plaintiffs were not denied refunds because they wished to travel: they lost their contributions because they resigned their public employment. A bill of attainder is a legislative act inflicting a penalty without a judicial trial. Cummings v. State of Missouri, 4 Wall. 277, 18 L.Ed. 356 (1866). No penalty was exacted here, for as we have found the plaintiffs were not deprived of property to which they have a claim.

In sum, the plaintiffs entered into public employment which had as one of its conditions mandatory contributions to the San Antonio Police and Firemen's

8. The plaintiffs also contend that the court improperly closed discovery before defendants answered their interrogatories as to the purpose for the no-refund provisions. The legislative intent behind a statute is determined from the language of the Act as well as its legislative history. The plaintiff's interrogatory as to legislative purpose called for a legal not a factual conclusion. At the time the district court ruled on the defendants' motion for summary judgment and the plaintiffs' cross-motion for partial summary judgment on liability, no material issue of fact remained disputed.

Pension Fund; Art. 6243f became by its terms an element of their contracts of employment. The no-refund provisions of Art. 6243f are reasonable and, in our view, constitutional.

Affirmed.

GODBOLD, Circuit Judge (dissenting in part).

I do not agree that this § 1983 suit can be maintained against the Board of Trustees of the Pension Fund, that is, the Board as an entity or agency. Nor do I agree that there is jurisdiction under § 1983 against the individual members of the Board for any relief other than declaratory and injunctive. I would hold that the only federal jurisdiction is over the individual Trustees of the Pension Fund and then only for purposes of injunctive and declaratory relief. In the exercise of that jurisdiction I would direct the entry of a judgment (against only the individual members) declaring that plaintiffs are not entitled to relief and holding that their prayer for an injunction was properly denied. To that extent, and no more, I agree with Judge Tuttle's opinion on the merits.

In the beginning, it is necessary to correctly identify who the defendants are and what the relief is that is asked. The defendants named in the caption of the complaint are the City of San Antonio, the Board of Trustees of the Pension Fund, and "the members of said Board, individually and in their

capacity as members of said Board."[1] The District Court dismissed the action against the city. In the body of the complaint the plaintiffs refer at times to the Pension Fund as a defendant. This ambiguity makes no substantive difference since for purposes of this case the collective Board of Trustees of the Fund and the Fund itself are the same arm or agency of the city.[2]

Judge Tuttle describes this case as an "action seeking a refund" of amounts contributed to the Pension Fund. I have to say, with deference, that this is an incorrect description. The complaint itself shows the suit to be much more than that. Plaintiffs claimed to be entitled to at least the following:

> (1) A declaration that the Texas statute, Article 6243f, is unconstitutional (A.61, 74).
>
> (2) An injunction against the enforcement of that statue (A.61, 74).
>
> (3) "An accounting, restitution,

1. Seven persons are named as serving in this capacity plus John Does as well.

2. However, as discussed below, this ambiguity helps to lay bare the erroneous theory that this is a mere suit against individuals.

damages, both general and special, and/or just compensation for the taking of Class Plaintiffs' private property for public use." (A.61; see also A. 72-75).

(4) "Damages and/or refunds against the above-styled Pension Fund and/or the City of San Antonio, which is the alter ego of said Pension Fund." (A. 62).

(5) The imposition of a constructive trust "on the amount of money in the defendant FIREMEN AND POLICEMEN's PENSION FUND OF SAN ANTONIO, which belongs to Plaintiffs and Class Plaintiffs, equal to the present value of all the money withheld by the Defendants." (A. 69; see also A. 73).

(6) In Section XVI of the complaint, entitled "Restitution," (at A. 70), these forms of relief were requested:

> Plaintiffs request this Court for a mandatory injunction compelling the Defendants to give an accounting of all the Plaintiffs' and Class Plaintiffs' contributions and to refund the amount or present value of said contributions plus the value of the money earned by the Defendants on said funds and/or alternatively a reasonable rate of interest, and/or for just compensation to Plaintiffs for the unconstitutional

> taking, plus attorney's fees and costs.

(7) Elsewhere plaintiffs request "a single liquid fund judgment" for amounts contributed, money wrongfully earned thereon, costs and attorney fees and any other relief legal or equitable that the court deems just (A. 70).

(8) And elsewhere plaintiffs ask for a judgment justly compensating them for "special damage or injury" under each one of their five alleged causes of action. The alleged "special damages" include "just compensation for taking of Plaintiffs' and Class Plaintiffs' private property for public use," and also such sums at the present value of money as will justly compensate plaintiffs and make them whole, considering that some contributions were made in the 1930's and 1940's in "100 cent dollars" and are now to be repaid in "19 cent dollars," and to include the value or amounts of money earned by defendants on contributions (A. 72-75).

First, as to jurisdiction over the Board of Trustees of the Pension Fund--the governmental entity. Monroe v. Pape, 365 U.S.167,81 S.Ct. 473, 5 L.Ed

2d 492 (1961), and City of Kenosha v. Bruno, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973), specifically dealt with the immunity of municipalities, the City of Chicago and the City of Kenosha. Similarly a municipality was involved in Moor v. County of Alameda, 411 U.S. 693, 93 S.Ct. 1785, 36 L. Ed. 2d 596 (1973), where the Supreme Court held that counties were protected by the same immunity. The rationale underlying the grant of immunity, however, has been held to extend to a wide variety of governmental entities. The Circuit Courts have indicated that the immunity extends to states,[3] agencies and

3. See, e.g., Cheramie v. Tucker, 493 F.2d 586 (CA5). cert. denied, 419 U.S. 868, 95 S.Ct. 126, 42 L.Ed.2d 107 (1974); U. S. ex rel, Gittlemacker v. County of Philadelphia, 413 F.2d 84 (CA3, 1969), cert. denied, 396 U.S. 1046, 90 S.Ct. 696, 24 L.Ed.2d 691 (1970); U.S. ex rel. Lee v. Illinois, 343 F.2d 120 (CA7, 1965); Williford v. California, 352 F.2d 474 (CA9, 1965).

departments of the state,[4] agencies

4. See, e.g., Chermanie v. Tucker,493 F.2d 586 (CA5), cert. denied, 419 U.S. 868, 95 S.Ct. 126, 42 L.Ed.2d 107 (1974) (state department of highways); United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, Fla., 493 F.2d 799 (CA5, 1974) (state department of pollution control); Sykes v. California, 497 F.2d 197 (CA9, 1974) (state department of motor vehicles); Burris v. State Dept. of Public Welfare of So. Carolina, 491 F.2d 762 (CA4, 1974) (state department of public welfare); Curtis v. Everette, 489 F.2d 516 (CA3, 1973), cert. denied, 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed.2d 774 (1974) (state bureau of corrections); Coopersmith v. Supreme Court, State of Colorado, 465 F.2d 993 (CA10, 1972) (state supreme court, court of appeals, district court, state bar association); Avins v. Mangum, 450 F.2d 932 (CA2, 1971) (state university); Zuckerman v. Appellate Division, Second Department, Supreme Court of State of New York, 421 F.2d 625 (CA2, 1970) (New York Appellate Division); Rosado v. Wyman, 414 F. 2d 170 (CA2, 1969), rev'd on other gnds., 397 U.S. 397, 90 S.Ct. 1207, 24 L.Ed 2d 442 (1970) (state department of social services); Clark v. Washington, 366 F.2d 678 (CA9, 1966) (state bar association). But see Forman v. Community Services, Inc., 500 F.2d 1246 (CA2, 1974), rev'd on other gnds. ___ U.S. ___, 95 S.Ct.2051, 44 L.Ed.2d 621 (1975) (state housing finance agency).

of counties,[5] agencies and departments of cities[6] and various other govern-

5. See e.g., United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, Fla., 493 F.2d 799 (CA5, 1974) (county area planning board); Robinson v. McCorkle, 462 F. 2d 111 (CA3), cert. denied, 409 U.S. 1042, 93 S.Ct. 529, 34 L.Ed.2d 492 (1972) (county hospital).

6. See e.g. Garrett v. City of Hamtramck. 503 F.2d 1236 (CA6, 1974) (city planning commission); Hathaway v. Worcester City Hospital. 475 F.2d 701 (CA1, 1973) (city hospital); Lehman v. City of Pittsburgh, 474 F.2d 21 (CA3, 1973) (city civil service commission); Henschel v. Worcester Police Department. 445 F.2d 624 (CA1, 1971) (city police department); Davis v. U.S., 439 F.2d 1118 (CA8, 1971) (city department of public welfare); U. S. ex rel. Gittlemacker v. County of Philadelphia. 413 F.2d 84 (CA3, 1969), cert. denied, 396 U.S. 1046, 90 S.Ct. 696, 24 L.Ed.2d 691 (1970) (city hospital); U.S. ex rel. Lee v. Illinois 343 F.2d 120 (CA7, 1965) (city police department).

mental entities.[7] In determining whether the Board of Trustees of the Pension Fund falls within the Monroe Kenosha exception, Judge Tuttle essentially ignores this developed area of federa law. He centers upon the phrase "in the nature of a municipality" used in Sterzing v. Fort Bend Independent School District, 496 F.2d 92 (CA5, 1974), with respect to a Texas school district. That phrase is, of course, not a means of analysis but a statement of a conclusion. To reach a decision in this case that the Board of Trustees of the Pension Fund is not "in the nature of a municipality" the majority opinion points out that the Board lacks broad governmental powers and functions. This is not enough. It is true that if a governmental entity, such as a state or city, possesses broad governmental powers and functions it falls within the Monroe-Kenosha municipal corporation exemption. But such characteristics, though sufficient to bring an entity within Monroe-Kenosha, are not necessary

7. See, e.g., Jorden v. Metropolitan Utilities District, 498 F.2d 514 (CA8, 1974)(utilities district providing gas, water and sewer services). Compare Wright v. Arkansas Activities Ass'n., 501 F.2d 25 (CA8, 1974), where it was held that "a regulatory agency established and supported by local school systems in the State on a voluntary basis" which "was not created by the Constitution or by any statute of the State of Arkasnas" was not immune from a § 1983 action.

to its being within that exemption. Entities that do not possess broad governmental powers and functions can, and frequently do, fall within the Monroe-Kenosha exemption.[8] In cases involving entities lacking such powers and functions, the ceciding factor is not the characteristics of the entity viewed in isolation but rather the purposes and status of the entity revealed by analysis of its relationship to the larger governmental body with which it is connected. The inquiry in such a case becomes whether the public body is so connected--administratively, functionally, fiscally, and in other ways--to a state, city or county that it is not suable under § 1983, not because of its characteristics as an independent entity but because it is in effect an arm or agency of the state, city, or

8. See, e.g., Sykes v. California, 497 F.2d 197 (CA9, 1974)(state department of motor vehicles); United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, Fla., 493 F.2d 799 (CA5, 1974)(state department of pollution control); Curtis v. Everette, 489 F.2d 516 (CA3, 1973), cert. denied., 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed.2d 774 (1974)(state bureau of corrections); Lehman v. City of Pittsburgh, 474 F.2d 21 (CA3, 1973)(city civil service commission); U.S. ex rel. Gittlemacker v. County of Philadelphia, 413 F.2d 84 (CA 3, 1969), cert. denied, 396 U.S. 1046, 90 S.Ct. 696, 24 L.Ed.2d 691 (1970)(city hospital). For other examples see footnotes 3 - 7, supra.

county.

This court recently reviewed the rationale of Monroe-Kenosha and the legislative history of § 1983 on which those cases are based and concluded that much wider groups of entities than simply municipalities are outside the term "person" and, therefore, are not suable under § 1983. Adkins v. Duval County School Board, 511 F.2d 690 (CA5, 1975).[9] In reviewing our prior decisions, we noted that municipalities, counties and states certainly fall within the Monroe-Kenosha immunity. Furthermore, since the "state itself [is] obviously not . . . a 'person' . . ., the entities through which the state functions should be excluded." 511 F.2d at 693. Consistent with this analysis, since the City of San Antonio is obviously not a "person," the Board of Trustees of the Pension Fund, as an entity through which that city functions, should be

9. See Comment, Suing Public Entities Under the Federal Civil Rights Act: Monroe v. Pape Reconsidered, 43 U.Colorado L.Rev. 105, 111 (1971): "[I]t has even been suggested that the holding in Monroe should apply only to cities, counties and parishes. However, this attempt to distinguish Monroe cannot be rationally supported within the framework of that case. The Monroe decision was based on the legislative history of the Civil Rights Act . . . and the reasoning of the Court would require the same result no matter what type of governmental entity was being sued."

excluded from the term "person."

There is a close connection between the City of San Antonio and the Pension Fund and the Board of Trustees thereof. The Board of Trustees consists of the mayor of San Antonio, two aldermen, councilmen or commissioners of San Antonio, two active San Antonio firemen and two active San Antonio policemen. Vernon's Ann.Civ.St. art. 6243f, § 2. Beginning August 1, 1963, the City of San Antonio was required to pay into the Fund sums of money (varying from $30,000 to $40,000 per month) until "the Board notifies the city that the Fund is actuarially sound." Vernon's Ann.Civ.St. art. 6243f, § 4. The city pays in an amount matching the sums deducted from the salaries of firemen and policemen. Vernon's Ann.Civ.St. art. 6243f, § 4. In addition the city contributes all sums collected from parking meters. Vernon's Ann.Civ. St. art. 6243f, § 16. The Treasurer of San Antonio is specifically designated to be the Treasurer of the Fund, collecting all money paid into the Fund and, on the basis of a monthly written list from the Board, paying out benefits. Vernon's Ann.Civ.St. art. 6243f, §§ 5, 6. Any deficiency between the money procured by the Fund and the amount of the payments made out of the Fund is paid by the City of San Antonio. Vernon's Ann.Civ.St. art. 6243f, § 21.

The extent of this administrative, functional and fiscal interrelation compels the conclusion that the Board of

Trustees of the Pension Fund is in essence an arm of the city. The non-municipal character of the Board of Trustees, discovered by the majority on this appeal, was neither revealed by nor claimed by the plaintiffs below. To the contrary, plaintiffs in their complaint described the city as the alter ego of the Fund (A.61, 62). They also alleged that the Pension Fund "operates for the benefit of and under the direction of the City of San Antonio." (A.66) (emphasis added). In the face of the revealed facts and plaintiffs' claims, to view the Board as an independent, non-governmental entity for § 1983 purposes overlooks the interrelationship between Fund and city and does violence to the concept of municipal corporation immunity discussed in Monroe and Kenosha. This is not to say that every public entity performins some function that a larger and related governmental entity might perform enjoys Monroe-Kenosha immunity. Necessarily a body of federal law must develop on a case-by-case basis, and, indeed, that process is already well under way. See footnotes 3-8, supra.

The majority describe the function of the Fund as "essentially private," pointing out that what it does could be as well performed by a non-governmental agency such as a bank or an insurance company. This is a dubious distinction at best, since many functions actually performed by cities--garbage collection and operation of hospitals, for example--can be, and at times are, contracted out to non-governmental agencies

or left to the private sector. The Eighth Circuit has recently declined to "import the often nebulous distinction between the proprietary and governmental functions of a municipal corporation into the federal law question of its civil liability under § 1983." Jorden v. Metropolitan Utilities District, 498 F.2d 514 (CA8, 1973). The term "private" [versus "public"] accomplishes by a semantical devise essentially the same importation.

Judge Tuttle relies upon language drawn from a Texas decision.[10] This decision, concerned with Texas constitutional provision which restrict the types of investments that can be made by the state counties, cities, towns and other political corporations and subdivisions, involved considerations of state policy and precedent largely unrelated to the question before us. Federal courts must make their own decisions, based upon federal law, of the status of a governmental agency as a "person" under 42 U.S.C. § 1983. Unless we cling to the rudder of the Supreme Court in Monroe and Kenosha, we will find ourselves lost in a sea of state court decisions concluding that various public entities are or are not "governmental entities" for purposes of

10. Bolen v. Board of Firemen, Policemen & Fire Alarm Operators' Trustees of San Antonio, Texas, 308 S.W.2d (Tex. Civ.App., 1957) (Writ Ref.)

some particular state constitutional or statutory provision. State court decisions may guide us in understanding, as a factual matter, the purposes, functions and status of the entity in question. But this court, in resolving the legal issue of Monroe-Kenosha immunity, must take direction from the multitudinous body of federal law, cited above,[11] which has addressed this precise question. No state court, however well respected, can override the body of federal law that guides us with respect to § 1983.

Second, I turn to the majority's theory that there is jurisdiction over the individual members of the Board of Trustees with respect to all types of relief sought. I believe there is jurisdiction to grant injunctive and declaratory relief against the Trustees but no more than that.

Obviously, the Trustees are "persons" in the sense that they are human beings. But before drawing any conclusions about the Trustee's amenability to suit, one should consider what is really at stake in this litigation. Upon piercing the veil--indeed there really is no veil--it is easy to perceive what the plaintiffs have in mind. In seeking an accounting, restitution, refunds,

11. See footnotes 3-8, supra.

damages for wrongful taking, and imposition of a constructive trust, plaintiffs are striking directly for the pocket of the Pension Fund. It is perfectly apparent, for example, that the constructive trust is not sought to be imposed on a fund in the individual pockets and bank accounts of the individual Trustees, but upon the assets of the Pension Fund.[12] The minimum that plaintiffs want in this case is a judgment enforceable against the assets of the Pension Fund through the medium of a judgment naming as judgment debtors the members of the Board of Trustees.[13] This case is quite different from those situations in which plaintiffs have brought damage actions in order to hold officers personally liable for maladministration or abuse of their positions. See, e.g., Wood v. Strickland, ___ U.S. ____, 95 S.Ct. 992, 43 L.Ed. 2d 214 (1975); Monroe v. Pape, 365 U.S. 167, 187, 81 S.Ct. 473, 5 L.Ed.2d 492, 505 (1961). Although a federal court has jurisdiction to hear such claims, none appear to be raised in the complaint

12. In fact, that is what the complaint specifically asks.

13. As already pointed out, some of the claimed relief is specifically asked against the Pension Fund itself, and the Fund is described as a "defendant."

before us. The Trustees' presence here is purely nominal.[14]

In Warner v. Board of Trustees of the Police Pension Fund of the City of New Orleans, No. 74-2303, a companion case pending before this panel, plaintiffs raised substantive claims like those in the instant case, but they eschewed any charade of "individual liability" of Trustees and met head-on the situation as it really existed. They explicitly stated that they did not desire a judgment against Board members as individuals and had no intent that the Board member defendants ever suffer personal liability. Rather, they said, they desired a judgment that would force the Board members to serve as conduits for the processing of claims that would be paid out of the pension fund and from no other source. The District Judge in that case treated the suit as just what it was, one in which the only claim against the trustees in their official capacities was a prayer for a declaration that would have the effect of requiring the Board to make refunds.[15]

14. For example, relief is claimed for a period of time extending back to the 1930's. It is obvious that there have been numerous predecessor trustees for whose acts the present members of the Board could not be held responsible.

15. The plaintiffs in Warner also sought a declaration as to the constitutionality of the statute. There, as here, §1983 jurisdiction exists to enter such a declaration.

The instant plaintiffs have made no such affirmative disclaimer, but their target is unmistakable. One need only read the complaint.

I agree with the Eighth Circuit's recent statement that "individuals and association acting under color of state law are not immune to the sanctions of the Civil Rights Acts and may be sued, unless it is clear to the court that the claim is actually a ruse by which personal jurisdiction over the state is sought to be exercised." Keckeisen v. Independent School District 612, 509 F.2d 1062, 1064 (CA8, 1975) (emphasis added). Such a ruse is before us today. The kind of attack on the public fisc that is represented by Warner and by this case strikes at the core of what was discussed in Monroe and Moor v. County of Alameda, supra. Both of those decisions traced the legislative history of the Civil Rights Act and found compelling indications that "Congress did not intend . . . to impose vicarious liability on municipalities for violations of federal civil rights by their employees." Moor, supra, 411 U.S. at 710 n.27, 93 S.Ct. at 1797.36 L.Ed.2d at 610 n.27. Judge Tuttle's opinion trivializes those decisions. Surely Monroe and Moor represent more that a rule of artful pleading--name the city as defendant and one is barred from access to the public treasury; name city officials as defendants and through a judgment against them condemn public funds.

The majority gloss over the far-

reaching implications of their action by noting that in Monroe "the Court seemed not the least concerned about whether substantial damages against the police officers of the City of Chicago would be paid only out of the pockets of the individual officers or out of appropriations made by the city government, or by their insurers." I agree that in cases where an individual's abuse of his authority is alleged a municipality's decision to indemnify or insure its employees is a question that does not concern us. Such payments could be viewed as part of the consideration a city pays for the officers' services. We would not pay attention to them in passing on the officers' personal liability, just as we would ordinarily not consider whether the official had taken out his own liability insurance policy. In a case like the present one, however, the question of who it is intended ultimately will pay is curcial, because it raises the possibility that a jurisdictional bar Congress intended to erect will be evaded. There is quite a difference between payment by the city that is voluntarily undertaken as a form of compensation, or for other reasons, and involuntary payment by the city that is inherent in the nature of the plaintiff's claim.

The Supreme Court in Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), was faced with an effort similar to the one undertaken in the present case. In Edelman plaintiffs sought, inter alia, to obtain welfare benefits wrongfully withheld by the State

of Illinois. To escape the state's Eleventh Amendment defense, plaintiffs named individual state officials as defendants. The Supreme Court, quoting from Rothstein v. Wyman, 467 F.2d 226 (CA2, 1972), cert. denied, 411 U.S. 921, 93 S.Ct. 1552, 36 L.Ed 2d 315 (1973), rejected this:

> It is not pretended that these payments are to come from the personal resources of these appellants. Appellees expressly contemplate that they will, rather, involve substantial expenditures from the public funds of the state. . . .
>
> It is one thing to tell the Commissioner of Social Services that he must comply with the federal standards for the future if the state is to have the benefit of federal funds in the programs he administers. It is quite another thing to order the Commissioner to use state funds to make reparation for the past. The latter would appear to us to fall afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force. Id., at 236-237 (footnotes omitted).

415 U.S. at 665, 94 S.Ct. at 1356, 39 L.Ed.2d at 673-674. If the interpretation of § 1983 set forth in Monroe and Moor "is to be conceived of as having any present force," then the fiction adopted in the present case must be rejected. Since Edelman was an Eleventh

Amendment case and our present inquiry is statutory, I make no contention that Edelman "expands" Monroe.[16] What it does do is to remind us that damage suits purporting to be against officers may in reality be suits against the government itself and that, when this is so, courts do not put on blinders to avoid seeing what is apparent.

As Judge Tuttle points out, we and other courts, post-Kenosha, have held that § 1983 actions can proceed against individual officers as parties defendant for injunctive relief, despite the fact that the ultimate judgment would "surely be felt by the city." United Farmworkers of Florida Housing Project, Inc., supra. See, e.g., Gresham v. Chambers, 501 F.2d 687 (CA2, 1974); Harper v. Kloster, 486 F.2d 1134 (CA4, 1973);[17] Cason v. City of Jacksonville, 497 F.2d 949 (CA5, 1973); Bramlet v. Wilson, 495 F.2d 714 (CA8, 1974); Ybarra v. City of Town of Los Altos Hills, 503

16. I agree with the majority that neither municipalities nor their officers are wholly immune from suits for damages in federal courts. The only issue before us is the scope of § 1983 and its jurisdictional counterpart, 28 U.S.C. §1343 (3).

17. Judge Tuttle's reliance on Harper is misplaced. In Harper the plaintiffs sought declaratory and injunctive relief only. No attempt was made by the plaintiffs in that case to obtain public funds.

F.2d 250 (CA9, 1974). See also Edelman v. Jordan, supra, 415 U.S. at 675, 94 S.Ct. at 1361, 39 L.Ed.2d at 679-80 (dictum). Kenosha does not however, foreclose any and all distinctions between these injunction suits and suits for such monetary relief as pension refunds. In Kenosha the Court said:

> We find nothing in the legislative history discussed in Monroe, or in the language actually used by Congress, to suggest that the generic word "person" in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them. Since, as the Court held in Monroe, "Congress did not undertake to bring municipal corporations withing the ambit of" § 1983, . . . they are outside of its ambit for purposes of equitable relief as well as for damages.

412 U.S. at 513, 93 S.Ct. at 2226, 37 L.Ed.2d at 116 (citations omitted). Manifestly, this language, by its terms, merely precludes distinctions based on the relief sought when "municipal corporations" are the defendants. The problem before us is different: when a complaint names a city official as the defendant, what claims for relief should be treated as analytically distinct from claims against the municipality, and what claims should be rejected as subterfuges that contravene the exemption from § 1983 announced in Monroe?

It would appear that the court's willingness to take § 1893 jurisdiction in injunction suits against officers has stemmed from the well-established fiction of Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Under that doctrine, a state official who seeks to enforce an unconstitutional act is to that extent "stripped of his official or representative character and is subjected in his person to the consequence of his individual conduct." Id. at 160, 28 S.Ct. at 454, 52 L.Ed. at 729. The case stands as a familiar cornerstone of our legal system, and one can readily understand why the courts in § 1983 cases have had no qualms about distinguishing between a city and its officials in the injunction context. See Ybarra v. City of Town of Los Altos Hills, supra, at 252-53. At the same time, although these cours have sometimes stated broadly that named city officials may be sued under § 1983, Judge Tuttle points to no decision sustaining an award from municipal funds by means of a suit

against municipal officers.[18]

18. Sterzing v. Fort Bend Independent School District, 496 F.2d 92 (CA5, 1974), involved a § 1983 action by a school teacher to obtain damages and reinstatement after he had been wrongfully discharged from his teaching position in violation of his constitutional rights. The District Court awarded damages but denied reinstatement. On appeal this court held that the District Court had denied reinstatement for improper reasons and therefore the District Court on remand should "fully reconsider" the appropriate remedy. This court further held that the defendant Texas school district, which is "in the nature of a municipality," was immune from suit under Monroe-Kenosha. The named school officials, however, were found to be proper defendants. Although the per curiam opinion is somewhat ambiguous, the conclusion that jurisdiction is proper as to the named officials may well have referred only to the remedy of reinstatement to be considered on remand. Such equitable non-monetary relief against officials is of course permissable. The citation in Sterzing. 496 F.2d at 93, n 2, to United Farm Workers of Florida Housing Project, supra, supports jurisdiction only to this extent. Insofar as the decision may permit the award of monetary damages, it would appear that the money would have had to come from the pockets of the individual defendants rather than the school district. The decision expresses no approval of employing the defendant officials as tools to reach into the school district fisc.

The distinction between an injunction against city officials and one against the city itself is a commonplace and sometimes may have real-life consequences. It may mean, for example, that the relief granted against one official will not bind his successor. See United Farmworkers of Florida Housing Project, Inc., supra, at 802 n.3; ef. Mayor of City of Philadelphia v. Educational Equality League, 415 U.S. 605, 622 94 S.Ct. 1323, 1334; 39 L.ED.2d 630, 646 (1974); Spomer v. Littleton, 414 U.S. 514, 94 S.Ct. 685, 38 L.Ed.2d 694 (1974). The line drawn by the majority is not only unprecedented; it is a pleading device and nothing more, inasmuch as the pension fund Trustees are nominal defendants from whose personal assets a recovery is not seriously contemplated.

The action against the Board of Trustees of the Pension Fund, as a Board, should be dismissed. The action against the individual members of that Board should be dismissed insofar as it seeks monetary relief. The action against the individual Trustees for declaratory and injunctive relief, however, is maintainable. With respect to that relief, I reach the merits and concur in Part II of Judge Tuttle's opinion.

APPENDIX F

Raymond MUZQUIZ et al.,
Plaintiffs-Appellants,

v.

CITY OF SAN ANTONIO et al.,
Defendants-Appellees.

No. 74-3177

United States Court of Appeals,
Fifth Circuit.

Feb. 27, 1976.

Former San Antonio policemen and firemen challenged a statute prohibiting refund from pension fund and sought declaratory and injunctive relief and damages. The United States District Court for the Western District of Texas, at San Antonio, Thomas J. Clary, J., sitting by designation, granted defendants' motion for summary judgment, holding the statute constitutional. The Court of Appeals affirmed, 520 F.2d 993. On rehearing en banc, the Court of Appeals, Dyer, Circuit Judge, held that the board of trustees of the policemen's and firemen's pension fund was not a "person" against whom liability under the 1871 civil rights statute could be asserted. The suit, for injunctive and declaratory relief and for damages, was in reality a suit against the board rather then against individual board members, and where any relief granted would be in substance a determination of entitlement to restitution from the fund, there was no jurisdiction under such statute, regardless of the nature of the suit,

notwithstanding the contention that individual members, also named as defendants, were persons suable under the statute.

Affirmed.

Brown, Chief Judge, filed an opinion dissenting in part and concurring in part.

Tuttle, Circuit Judge, dissented and filed opinion in which Wisdom, Goldberg and Morgan, Circuit Judges, joined.

Thornberry, Circuit Judge, filed an opinion dissenting in part and concurring in part.

Godbold, Circuit Judge, filed an opinion dissenting in part and concurring in part.

1. Civil Rights

Board of trustees of policemen's and firemen's pension fund was not "person" against whom liability under 1871 civil rights statute could be asserted. Vernon's Ann.Tex.Civ.St. arts. 6243f, 6243f, § 19; 42 U.S.C.A. § 1983.

2. Courts

Suit for injunctive and declaratory relief and for damages with respect to allegedly unconstitutional state statute prohibiting refunds from policemen's and firemen's pension fund was in reality suit against board of trustees of the fund, rather than against individual board members, and where board was not "person" within 1871 civil rights statute and where any relief granted

would be in substance a determination of entitlement to restitution from the fund, there was no jurisdiction under such statute, regardless of nature of suit, notwithstanding contention that individual members, also named as defendants, were persons suable under such statute. Vernon's Ann. Tex.Civ.St. arts. 6243f, 6243f, § 19; 42 U.S.C.A. § 1983.

Appeal from the United States District Court for the Western District of Texas.

Before BROWN, Chief Judge, TUTTLE, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, MORGAN, CLARK, RONEY, GEE and TJOFLAT, Circuit Judges.

DYER, Circuit Judge:

Former San Antonio policemen and firemen filed this class action against the Pension Fund Board of Trustees and its individual members seeking damages and refunds of the amounts they obligatorily contributed to a pension fund during their employment but which they were barred from receiving after their separation under Article 6243f, § 19,

Vernon's Texas Civil Statutes.[1] They raised a myriad of constitutional challenges to the no-refund provisions of the statute. The district court granted summary judgment for the defendants. A panel of this Court, finding that the no-refund provisions of Article 6243f were reasonable and constitutional, affirmed on the merits.[2]

The Court took this case en banc because it posed questions of jurisdictional importance in the ever burgeoning area of relief sought under 42 U.S.C.A. § 1983.[3]

. . . .

1. The Act provides in pertinent part:

> "[N]o member of either of said Departments or of said Fund shall ever be entitled to any refund from said Fund on account of the money deducted from that amount of their pay . . . which money is in itself declared to be public money, and the property of said Fund for the benefit of the members qualifying for benefits, and their beneficiaries."

2. The facts and issues are fully stated in the panel opinion, Muzquiz v. City of San Antonio, 5 Cir. 1975, 520 F2d 993.

3. For like jurisdictional reasons the Court also considered en banc Warner v. Bd. of Tr. of Pol. Pen. Fund, etc., 5 Cir. 1975, 522 F.2d 1384, this day decided, ____ F.2d ____.

Two basic questions are presented. First, is the Board of Trustees of the Pension Fund a "person" and therefore suable under Section 1983? Second, is there jurisdiction over the individual members of the Board of Trustees to require them to cause payments from the fund to be made to the plaintiffs as restitution for the money paid into the fund?[4] We answer both questions in the negative.

I

In his dissent Judge Godbold adopted the rationale underlying the grant of immunity to cities, Monroe v. Pape, 1961, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492; Kenosha v. Bruno, 1973, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109, to the governmental entity here involved, the Board of Trustees of the Pension Fund, and concluded that the Board was not a "person" within the contemplation of Section 1983. We agree with the reasons undergirding this holding and without iterating them, we approve and adopt them as the opinion of the Court en banc.

II

With respect to the court's jurisdiction over the individual members of the Board of Trustees, again we agree with Judge Godbold's dissent, and his conclusion that there is a want of jurisdiction under Section 1983 to entertain plaintiffs' suit seeking an accounting, restitution and refunds, all of which "strik[e] directly for

. . . .

4. On oral argument plaintiffs withdrew their claims for damages.

the pocket of the Pension Fund." Muzquiz at 1007.[5] We only wish to make clear the basis for this decision.

The panel opinion argues that it is incongruous to hold that the individual board members are "persons" within the meaning of § 1983 when some forms of relief, such as money damages, are sought, and at the same time to hold that the board members are not "persons" when other forms of relief, such as restitution, is sought. But this is not the basis of our decision. We do not hold that the status of the board members as "persons" is variable, dependent upon the relief sought. Rather, we hold that this is a suit not against the nominal defendants, the individual board members who are "persons", but instead is a suit against an unnamed, though very real, party defendant, the Pension Board itself, an entity which, as we have held previously, is not a "person". Therefore, § 1983 jurisdiction must fail.

In form, plaintiffs seek against the

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5. As we noted earlier, on oral argument plaintiffs withdrew their demand for damages. If this were a suit seeking damages against the individual members of the Board for their alleged deprivations of a constitutional right, jurisdiction under § 1983 would exist. In that instance, plaintiffs would not be using the members of the Board as conduits to reach the Fund. Plaintiffs, of course, would have to prove their case and the board members could raise valid defenses. See O'Connor v. Donaldson, 1975, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396; Wood v. Strickland, 1975, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214.

individual members of the board a mandatory injunction ordering the individual members to refund past contributions to the fund. However, in substance, this is nothing more than restitution against the fund itself. If we allowed this action to proceed, then the bar which has been created by the judicial interpretations of § 1983 would be effectively eliminated, for any action which seeks restitution against a "nonperson" may be framed in terms of a mandatory injunction against the officials responsible for the fund from which restitution is sought. The congressional intent which impels the "nonperson" limitation cannot be so lightly construed. The detailed analysis of Judge Godbold's dissent fully supports this position.

We take issue with only one aspect of that dissent. Judge Godbold concludes that the action against the individual members of the board should be dismissed insofar as it seeks monetary relief in the form of restitution. However, he also concludes that the action against the individual members is maintainable, insofar as it seeks declaratory and injunctive relief. The declaratory and injunctive relief sought is a declaration that Article 6243f is unconstitutional, and an injunction against its enforcement. Article 6243f is prohibitory in nature, barring refunds of monies previously paid into the fund. A declaration that it is unconstitutional, or an injunction against its enforcement, is in substance a determination of plaintiffs' entitlement to restitution from the fund itself. This determination, as we have held, is barred under § 1983 because of the "nonperson" status of the fund's Board of Trustees.

Thus, we conclude that under the peculiar facts of this case, either a mandatory injunction directed against the individual members of the board, or injunctive and declaratory relief with respect to the statute is tantamount to a money judgment for restitution against the fund, an entity against which relief may not be directed under the court's § 1986 jurisdiction.

III

Since jurisdiction fails, we do not reach the merits.

Affirmed.

JOHN R. BROWN, Chief Judge (dissenting and concurring in part).

With respect to the meaning of "person" under § 1983, I concur in Judge Tuttle's opinion.

With respect to the remedy against individual members of the Board of Trustees in either their personal or official capacities, I concur in the result in Part II of Judge Dyer's opinion for the Court. I also concur in the opinion except that I reserve the question as to declaratory orders or injunctions which do not have the operative effect of directing restitution of the public funds.

TUTTLE, Circuit Judge, with whom WISDOM, GOLDBERG and MORGAN, Circuit Judges, join (dissenting).

With deference I dissent. Apparently because of its concern with the "ever burgeoning area of relief sought under

42 U.S.C.A. § 1983" the court seems to me to have whittled down the clear statutory grant of civil rights litigation under color of state law to little more than an empty promise. This is so because it is hard to conceive of a situation where a person acts under color of state law without being involved in a governmental type body.

It must be borne in mind that all we are doing is construing a statute. Section 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The Supreme Court has held that a municipal corporation is not a "person" within the contemplation of this statute. Monroe v. Pape, 365 U.S. 176, 81 S.Ct. 473, 5 L. Ed.2d 492 (1961); City of Kenosha v. Bruno, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973). The Court has also held that a county is sufficiently like a municipality that it must also be accounted to be a non-person under this section. Moor v. County of Alameda, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973).

The Court has not held that a true "person" cannot be sued merely because by means

of the suit the public fisc would be reached through the court's equity powers. Such a holding, as in my judgment is the decision of the court here, flies in the face of a literal reading of the language: "Every person, who, under color of any statute . . . shall be liable . . . in . . . [a] suit in equity, or other . . . proceeding for redress."

The error which, respectfully, I think the court has made here is that it treats § 1983 as a statute granting or creating some sort of immunity to a municipal corporation within the word "person". The clearest evidence of the Supreme Court's understanding of this basic fact is the treatment it gave to the case of Moor v. County of Alameda. There the Court held that a suit could not be maintained against Alameda County in California because the County was not a "person". The Court did not stop there, however. It gave instead what might to some be considered a very liberal construction of the word "citizen" in the diversity jurisdiction clause[1] in order to permit the action against Alameda County to proceed on the theory that it was a citizen of the State of California.

In its use of the word "person" in § 1983 Congress did not intend for it to have an arcane or restricted meaning to be determined on the basis of the effect the created cause

. . . .

1. "The district courts shall have original jursidiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 . . . and is between--
(1) citizens of different States."
28 U.S.C. § 1332(a)(1).

of action might have on the public moneys of a municipality. The majority writes a new definition which says a true live and breathing person who is a trustee of a fund created by a municipality is not a "person" because the Congressional policy is not to permit a suit to be maintained against the city itself.

This approach is even less understandable to me in light of a post-Kenosha case of the Supreme Court. In Bradley v. School Board, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974), the Court permitted a suit under § 1983 to require the payment of an attorney's fee to be charged against the Board itself. I would suppose that no member of this Court would think this board of trustees of a pension fund would be less a "person" than the Board of Education of the City of Richmond. See Davis v. Bd. of School Commissioners of Mobile County, 526 F2d 865 (5th Cir. 1976), in which a panel of this Court recognized the identical right for recovery of attorneys' fees against a board of education.

Pretermitting entirely the question whether the "Pension Fund Board of Trustees" would qualify as a person, I have no doubt but that the members of this Board, sued in their individual capacities and as trustees, are persons. See Burt v. Bd. of Trustees of Edgefield Co. School Dist., 521 F2d 1201, 1205 (4th Cir., 1975). This is so even though, by suing them, the plaintiff if successful might be able, through equity,

to get at the funds they are administering.[2] Such was the case when the Supreme Court carbed out the exception of the Eleventh Amendment (a much more significant result, since the Constitution was involved, rather than the construction of a statute) in Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

I would hold that the trial court had jurisdiction of this case under § 1983.

THORNBERRY, Circuit Judge (concurring in part and dissenting in part).

I fully concur in Part I of Judge Dyer's opinion, agreeing with the conclusion that the San Antonio Pension Fund Board of Trustees is not a "person" subject to suit under 42 U.S.C. § 1983.

. . . .

2. See Incarcerated Men of Allen Co. Jail v. Fair, 507 F2d 281 (6th Cir. 1974), in which the court said:

> "A federal court may, however, award equitable relief against local officials, even though it will have a severe impact on local governmental funds, without infringing the policies behind § 1983. See Brown v. Board of Education, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955); Northcross v. Board of Education, 489 F2d 19 (6th Cir. 1973)." (Emphasis in original) 507 F2d 288.

I see no valid distinction between the impact on local funds caused by jail reform suits, reinstatement and back pay suits, school desegregation suits and the impact on the pension fund that a restitutionary award here would cause.

I find, however, that I am unable to concur in Part II of that opinion, which deals with the amenability of individual Board members to § 1983 suit. Judge Tuttle's indisputably correct observation that such individuals or "persons" under any reasonable definition of that term alone seems to me sufficient to conclude the issue. However certain the Court may be that an action is, "in reality", one directed at a governmental non-person, the fact is that the named defendants, and the ones against whom equitable relief would run, are persons. If Congress intended the statute to be construed other than in accordance with its natural and literal meaning, it could have given-- or could now give--some objective basis for that conclusion. There is none.

Moreover, I seriously doubt the practical ability of the Courts to determine when an action falls within the ambit of the Court's decision in this case. In a decision that apparently is not overruled by the Court today, we held that individual government officials may be the object of injunctive relief under § 1983, even though that relief would have much the same effect as an injunction directed to the government body itself. United Farmworkers of Fla. Housing Project, Inc. v. City of Delray Beach, 493 F2d 799 (5 Cir. 1974). Indeed, in prison cases and school cases, to name only a couple of examples, injunctivc relief against governmental officials will as clearly require expenditures by those officials from the applicable government coffers as in the action before us. We have also upheld awards of equitable monetary release directed against individual officials despite the fact that the money would ultimately be paid, through formal or informal indemnification arrangements, by the governmental "non-person" involved. E. G., Gates v. Collier, 489 F2d 298 (5 Cir. 1973), vacated and remanded on other grounds, 522 F2d 81 (5 Cir. 1975)(En banc); Harkless v. Sweeney Ind. School Dist., 427 F2d 319 (5 Cir. 1970).

I do not mean to suggest that it is impossible to draw distinctions between such cases and the one before us today. But I do contend that these cases foreclose a distinction based upon the relatively clear and logical basis of whether the relief sought will ultimately come from the individual who is the immediate subject of the applicable order or the governmental entity with which he is associated. Instead, the Courts will be forced to wrestle, as has this Court, with the vague and elusive question of whether an action is "in reality" or "in substance" one against a person or a non-person. It seems to me that, at least as long as the earlier decisions mentioned remain good law, attempts to thwart indirect § 1983 actions against governmental "non-person" will cause the Courts great difficulty and result in decisions that are lacking in both consistency and logic.

For these reasons, I dissent from Part II of the Court's opinions.

GODBOLD, Circuit Judge (concurring in part and dissenting in part).

I am unable to fully join in Judge Dyer's opinion despite the fact that it adopts in large part of the dissenting opinion that I filed to the panel opinion. I disagree with the holding with respect to declaratory and injunctive relief against the individual Trustees. I now see that issue

more clearly, and hopefully can discuss it more clearly, than in my earlier dissent. To the extent that anything said in the original dissent is broader than what is here said, I recede from it.

Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), proscribed § 1983 suits against cities for damages. It did not decide whether its proscription applied to forms of relief other than damages. City of Kenosha v. Bruno, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973), answered that question by holding that in a suit against a city the Monroe rule applies to injunctive and declaratory relief sought against the city. Kenosha was not concerned with whether injunctive and declaratory relief is available under § 1983 against public officers. Since Kenosha, both the Supreme Court and this court have approved injunctions issued against public officers under § 1983. Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975)(school officials); Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (prison officials); United Farmworkers v. City of Delray Beach, 493 F2d 799 (CA 5, 1974) (municipal officials).

Is injunctive and declaratory relief against public officials, ordinarily available under § 1983, unavailable if the relief will have some financial impact upon the public fisc? The answer to this question lies in recognizing that Monroe, and its roots in the Civil Rights Acts, protect the municipal treasury against damages. Also, of course, injunctive and declaratory relief against a public officer is not available under § 1983 if it is a sham device to reach

into the public treasury in pursuit of a claim for damages. But dollar impact on the public treasury resulting from bona fide equitable or declaratory relief that requires public officers to make restitution out of the public treasury is another matter. Monroe did not deal with such claims. Kenosha did not broaden the policy implemented by Monroe into a broader policy of insulating public funds from the impact of non-damage claims asserted under § 1983.

Arguably a city treasury does not have full title to funds that it possesses but in equity or under principles of restitution is bound to turn over to others property entitled to them. Thus it might be said that such funds are not part of the public fisc at all. But one need not embark on the intricacies of property concepts. More fundamentally, Monroe protects the treasury from damages in the narrow sense, not from non-damage claims.

We recognized and followed this distinction in Harkless v. Sweeny Ind. School Dist., 427 F2d 319 (CA 5, 1970), cert. denied, 400 U.S. 991, 91 S.Ct. 451, 27 L.Ed.2d 439 (1971). In Part II of that case we held that Monroe did not prohibit § 1983 suits against public officials for equitable relief, and in Part III we held that turning over to improperly discharged teachers their back pay was an integral part of the equitable remedy of reinstatement. These parts of Harkless remain viable, unaffected by Kenosha.[1]

. . . .

1. Part I of Harkless, in which we held that a suit could be maintained against the School District for equitable relief has, of course, been supplanted by Kenosha. See Adkins v. Duval County School Board, 511 F2d 690, 692 (CA 5, 1975).

The ultimate result in this case is an overreaction by the Court en banc. The plaintiffs sought restitution, assorted equitable relief, and damages of almost every kind and variety within the ingenuity of a legal draftsman. The panel opinion, ignoring the damage claims, characterized the suit as an "action seeking a refund" and upheld jurisdiction, making no distinction between suits seeking damages from the public treasury and suits not for damages that nevertheless might have a dollar impact on the fisc. This left open the possibility that in future cases judgments for damages might be entered against individual city officers and sought to be enforced against public treasuries. To close off this end run around Monroe the court en banc, while recognizing that the plaintiffs now disclaim damages, has proceeded to give to Monroe wider scope than that case was intended to have.

In summary, I concur in the holding that the Pension Fund is not a person and in the implicit holding that § 1983 proscribes suit against the individual Trustees for damages. I dissent from the holding that § 1983 also proscribes suit against the individual officers for restitution and other equitable relief not in the nature of damages.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-3177

RAYMOND MUZQUIZ, et al,

Plaintiffs-Appellants,

vs.

CITY OF SAN ANTONIO, et al,

Defendants-Appellees.

MOTION TO CERTIFY ISSUES

Appellants above-styled hereby move this court to certify three specific issues duly raised by Appellants concerning jurisdiction that were not covered in this Court's en banc opinion of February 27, 1976. They are as follows:

1. That Appellants have ascertained the 28 U.S.C.A. 1331 requirement for a $10,000 jurisdictional amount is unconstitutional when considered in light of the defeated Randoll Plan of August 12, 1787, and therefore as such a jurisdictional amount for consideration for Federal question is unconstitutional.

2. That the Fifth and Fourteenth Amendments to the Constitution of the United States, being prohibitory provisions, are self-executing and therefore need no particular statute to confer federal juris-

diction upon the United States District Court in the instant case.

3. Because of the legislature history of 28 U.S.C.A. 1343 no jurisdictional amount and no other statute is necessary in the instant case to confer jurisdiction.

WHEREFORE, Appellants pray that this Court will certify the above three issues in order to assure that Appellants' appeal to the United States Supreme Court is properly raised.

DATED this 22nd day of March, 1976.

/s/ Kermitt L. Waters
KERMITT L. WATERS
323 Las Vegas Blvd. S.
Las Vegas, Nv. 89101
Attorney for Appellants

POINTS AND AUTHORITIES

F.R.A.P. Rule 27

Appellants submit that they intend to take appropriate appeal (certiorari) to the United States Supreme Court. Appellants do not wish to be confronted in the United States Supreme Court with an additional issue of whether such issues were properly raised below in this Court. Even though jurisdictional issues can usually be raised at any time, the United States Supreme Court is in a changing mood these days and therefore Appellants herein seek this protective order.

/s/ Kermitt L. Waters

KERMITT L. WATERS
323 Las Vegas Blvd. S.
Las Vegas, Nv. 89101
Attorney for Appellants

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing MOTION TO CERTIFY ISSUES was this 22nd day of March, 1976, deposited in the United States Post Office, postage prepaid thereon, addressed to:

HARVEY L. HARDY, ESQ.
Northwood Executive Building
1600 Northeast Loop 410, Suite 130
San Antonio, Texas 78209

Attorney for Defendants Firemen and Policemen's Pension Fund Board of Trustees; and Individual Member Trustees,

and

CRAWFORD B. REEDER, CITY ATTORNEY
EDGAR A. PFEIL
Assistant City Attorney
140 Main Plaza, Suite #103
San Antonio, Texas 78205

Attorney for City of San Antonio

/s/ Janice L. Selvidio
Janice L. Selvidio

APPENDIX H

THE JUDICIAL SYSTEM

1. Draft of August 6, 1787, Constitutional Convention, Philadelphia, Pennsylvania, reads as follows:

"ARTICLE XI

Sect. 1. The Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States.

Sect. 2. The Judges of the Supreme Court, and of the Inferior Courts, shall hold their offices during good behavior. They shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Sect. 3. The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting Ambassadors, other Public Ministers and Consuls; to the trial of impeachments of officers of the United States; to all cases of Admiralty and maritime jurisdiction; to controversies between two or more States, (except such as shall regard Territory or Jurisdiction) between a State and Citizens of another State, between Citizens of different States, and between a State or the Citizens thereof and foreign States, citizens or subjects. In cases of impeachment, cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall

be party, this jurisdiction shall be original. In all the other cases before mentioned, it shall be appellate, with such exceptions and under such regulations as the Legislature shall make. The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time.

Sect. 4. The trial of all criminal offences (except in cases of impeachments) shall be in the State where they shall be committed; and shall be by Jury.

Sect. 5. Judgment, in cases of Impeachment, shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honour, trust or profit, under the United States. But the party convicted shall, nevertheless be liable and subject to indictment, trial, judgment and punishment according to law." (Emphasis added)

DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, 69TH CONGRESS, 1ST SESSION, HOUSE DOCUMENT NO. 398, GOVERNMENT PRINTING OFFICE (1927), PAGE 479.

2. The Constitution, as adopted by 1787 Convention, and Ratified by the States, reads as follows:

"ARTICLE III.

Section 1. The judicial Power of the United

States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the

said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained." (Emphasis added)

APPENDIX I

MINUTES OF THE CONSTITUTIONAL CONVENTION, PHILADELPHIA, PENNSYLVANIA, 1787

(Excerpt from James Madison's minutes of proceedings, August 27, 1787)

"The following motion was disagreed to, to wit to insert 'In all the other cases before mentioned the Judicial power shall be exercised in such manner as the Legislature shall direct' Del. Virga ay. N.H. Con. P. M. S.C. G no

On a question for striking out the last ('clause' stricken out) sentence of sect. 3. 'The Legislature may assign & c--' N.H. ay--Ct. ay. Del--ay--Md ay--Va ay--S--C. ay--Geo. ay."

Documents Illustrative of the Formation of the Union of the American States, 69th Congress, 1st Session, House Document No. 398, Government Printing Office (1927), pages 625, 626.